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This chapter traces the steps of a criminal action involving a violation of Vehicle Code §625 or §904, focusing on procedural issues that are particularly significant in these types of cases.

2.1 Investigative Stops

A. Constitutional Limitations

Brief investigative stops short of arrest are permitted where police have a reasonable suspicion of ongoing criminal activity. The criteria for a constitutionally valid investigative stop are that the police have “a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing.” *People v Peebles*, 216 Mich App 661, 665 (1996), citing *People v Shabaz*, 424 Mich 42, 59 (1985). A totality of the circumstances test is used in cases involving investigative stops. *People v Christie (On Remand)*, 206 Mich App 304, 308 (1994), citing *Terry v Ohio*, 392 US 1 (1968) and *People v Faucett*, 442 Mich 153, 168 (1993).

In *People v Whalen*, 390 Mich 672, 682 (1973), the Michigan Supreme Court articulated the following rules regarding the stopping, searching, and seizing of motor vehicles and their contents:

- Reasonableness is the test that is to be applied for both the stop and search of motor vehicles.
- Reasonableness will be determined from the facts and circumstances of each case.

- Fewer foundation facts are needed to support a finding of reasonableness when moving vehicles are involved than if a house or home were involved.
- An investigatory stop of a vehicle may be based upon fewer facts than needed to support a finding of reasonableness where both a stop and a search is conducted by police.

In *People v Christie, supra*, the Court of Appeals expressed the general principle that erratic driving can give rise to a reasonable suspicion of unlawful intoxication that justifies an investigatory stop by police. Applying this principle, the Court upheld the stop of a vehicle seen swerving, driving on the lane markers, and operating for two-tenths of a mile with its turn signal flashing. In this case, the Court held that the stop was “a minimal intrusion of defendant’s Fourth Amendment rights in light of defendant’s potential danger to the public.” 206 Mich App at 310.

See also *People v Peebles, supra*, in which the Court of Appeals upheld the investigatory stop of a vehicle traveling without headlights in a parking lot at 3:30 a.m., finding the circumstances sufficient to give rise to a reasonable suspicion of careless driving or theft.

Police are not required to give *Miranda* warnings to persons whose vehicles have been pulled over in an investigative stop. The *Miranda* safeguards apply only after a person is in custody for an offense. *People v Chinn*, 141 Mich App 92, 96 (1985).

B. Preliminary Chemical Breath Analysis

MCL 257.625a(2); MSA 9.2325(1)(2) authorizes police officers to require a person to submit to a preliminary chemical breath analysis where they have reasonable cause to believe that one of the following circumstances exists:

- The person was operating a vehicle on a Michigan public highway, or a place open to the public or generally accessible to vehicles, including an area designated for parking, and may have consumed alcohol so that his or her ability to operate the vehicle was affected.
- The person was operating a commercial motor vehicle while his or her blood, breath, or urine contained any measurable amount of alcohol or while he or she had any detectable presence of intoxicating liquor.
- The person was under age 21 and operating a vehicle on a Michigan public highway, or a place open to the public or generally accessible to vehicles, including an area designated for parking, while he or she had any bodily alcohol content as defined in the zero tolerance provision of Vehicle Code §625(6).

A police officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. MCL 257.625a(2)(a); MSA

9.2325(1)(2)(a). See Section 2.2 for more discussion of police authority to make a warrantless arrest in drunk driving cases.

Refusal to submit to a preliminary chemical breath analysis will result in misdemeanor or civil sanctions. MCL 257.625a(2)(d), (5); MSA 9.2325(1)(2)(d), (5). See Section 3.8 for discussion of this offense.

A person who submits to a preliminary chemical breath analysis remains subject to the requirements of the implied consent statute and the provisions for its enforcement. MCL 257.625a(2)(c); MSA 9.2325(1)(2)(c). See Section 2.3 for discussion of the implied consent statute.

The use of preliminary chemical breath analysis results as evidence is discussed in Section 2.8(A).

2.2 Police Authority to Arrest Without a Warrant

The discussion in this section addresses police officers' warrantless arrest authority in drunk driving cases. It is limited to the statutory and other legal principles that are most frequently at issue in these cases, and is not intended to be a comprehensive discussion of warrantless arrest under Michigan law.

For a discussion of arrest warrants, see Michigan Judicial Institute, *Issuance of Complaints and Arrest Warrants* (Criminal Benchbook Series, Monograph 1, 1992).

A. Statutory Authority

The general warrantless arrest statute (MCL 764.15; MSA 28.874) sets forth a detailed list of situations under which police may make a warrantless arrest.* As a general rule, this statute distinguishes between felony and misdemeanor offenses for purposes of warrantless arrest. In felony cases, an officer may make a warrantless arrest if the offense was committed in the officer's presence, or if the officer has reasonable cause to believe a felony was committed, and reasonable cause to believe that the person arrested committed it. See MCL 764.15(1)(a)–(d), (f); MSA 28.874(1)(a)–(d), (f). In misdemeanor cases, however, a police officer may generally not make a warrantless arrest unless the offense was committed in the officer's presence. See *People v Lyon*, 227 Mich App 599, 604 (1998).

The Michigan Legislature has created a number of exceptions to the general rule prohibiting warrantless arrest on reasonable cause in misdemeanor cases. In drunk driving cases, the following exceptions apply:

- **Accidents involving intoxicated drivers**

MCL 257.625a(1)(a); MSA 9.2325(1)(1)(a) provides for warrantless arrest where:

*This discussion will only address the provisions of the general warrantless arrest statute that are most relevant to drunk driving cases.

*MCL
764.15(1)(h);
MSA
28.874(1)(h)
contains a similar
provision.

“[t]he peace officer has reasonable cause to believe the person was, at the time of an accident in this state, the operator of a vehicle involved in the accident and was operating the vehicle in violation of [MCL 257.625; MSA 9.2325] or a local ordinance substantially corresponding to [MCL 257.625; MSA 9.2325].”*

See Section 1.4(F) for a definition of “operating” a vehicle. The requirements for an “accident” are discussed at Section 2.4(B)(1).

- **Intoxicated driver in stopped vehicle**

MCL 257.625a(1)(b); MSA 9.2325(1)(1)(b) provides for warrantless arrest where:

*MCL
764.15(1)(i);
MSA
28.874(1)(i)
contains a similar
provision.

“[t]he person is found in the driver’s seat of a vehicle parked or stopped on a highway or street within this state if any part of the vehicle intrudes into the roadway and the peace officer has reasonable cause to believe the person was operating the vehicle in violation of [MCL 257.625; MSA 9.2325] or a local ordinance substantially corresponding to [MCL 257.625; MSA 9.2325].”*

See Section 1.4(F) for a definition of “operating” a vehicle.

B. Reasonable Cause to Make a Warrantless Arrest

In criminal cases, “reasonable cause” is shown by facts leading a fair-minded person of average intelligence and judgment to believe that an incident has occurred or will occur. *People v Richardson*, 204 Mich App 71, 79 (1994). See also *People v Lyon*, 227 Mich App 599, 611 (1998), citing *Illinois v Gates*, 462 US 213, 243 n 13 (1983) (Probable cause requires “only a probability or substantial chance of criminal activity, not an actual showing of criminal activity.”)

Probable cause to make an arrest may be established in whole or in part based upon the results of a preliminary chemical breath analysis.* The results of this analysis are admissible (along with other competent evidence) in a criminal prosecution for a drunk driving offense enumerated in §625c(1) to assist the court in determining a challenge to the validity of an arrest. MCL 257.625a(2)(a)–(b); MSA 9.2325(1)(2)(a)–(b).

*See Section
2.1(B) for
situations where
a preliminary
chemical breath
analysis may be
required.

Note: The offenses enumerated in §625c(1)* are:

- OUIL/OUID/UBAC under §625(1).
- OWI under §625(3).
- OUIL/OUID/UBAC/OWI causing death or serious impairment of a body function under §625(4) or (5).
- Zero tolerance violations under §625(6).

*MCL
257.625c(1);
MSA
9.2325(3)(1) is
the “implied
consent” statute.

- Child endangerment under §625(7).
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Violation of a local ordinance substantially corresponding to §625(1), (3), or (6), §625a(5) or §625m.
- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, *if* the police had reasonable grounds to believe the driver was operating the vehicle: 1) while impaired by or under the influence of alcohol and/or a controlled substance; 2) with an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine; or, 3) in violation of the zero tolerance provisions of §625(6).

C. Warrantless Arrest Incident to Securing Medical Attention After an Accident

Police officers may enter a home without a warrant when they reasonably believe that a person inside the home may be seriously injured. Once inside, they may arrest for misdemeanor violations of city ordinances, OUIL, and leaving the scene of a personal injury accident, if, after proper entry, they have reasonable cause to believe that the person was the driver of a vehicle involved in the accident. *City of Troy v Ohlinger*, 438 Mich 477 (1991).

In *Ohlinger*, a police officer followed the defendant from the scene of an auto accident to a home. The vehicle involved in the accident was parked in the driveway of the home. After ringing the doorbell and attempting unsuccessfully to telephone the residence, the officer shined a light into a window and saw the defendant lying on a bed. The defendant was not moving, and was bleeding from the head. The officer entered the home through an unlocked door and roused the defendant, who was not seriously injured. While speaking with the defendant, the officer noted the odor of alcohol on the defendant's breath, along with unsteadiness and slurred speech. A witness to the auto accident was summoned to the home, where he identified the defendant as the driver of a vehicle involved in the accident. The defendant was arrested and charged with OUIL, city ordinance violations, and leaving the scene of a personal injury accident. The district court ruled that the officer's entry into the defendant's home was lawful, and denied the defendant's motion to suppress all evidence obtained as a result of the entry. On appeal, the Michigan Supreme Court upheld the district court's decision. With respect to the officer's entry into defendant's home, the Court held:

“Where the police have probable cause, based on specific, articulable facts, to believe that immediate entry is necessary to assist a person who may be in serious need of medical aid, they may enter without a

warrant. The entry must be limited to the justification therefor, and the officer must be motivated primarily by the perceived need to render aid or assistance. The officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance.” 438 Mich at 483–484.

In so holding, the Court noted that entry would not have been justified solely on the basis that the defendant may have been intoxicated. 438 Mich at 484 n 5.

Regarding the warrantless arrest of the defendant for a misdemeanor, the Court held that “once lawfully inside a residence, a police officer may make an arrest without a warrant that is authorized by law.” 438 Mich at 486. In the *Ohlinger* case, the arresting officer was lawfully on the premises to investigate a possible serious medical emergency. As a result of that investigation, the officer had reasonable cause to believe that defendant was involved in an accident and driving while intoxicated in violation of an ordinance corresponding to a state statute, permitting a warrantless arrest under MCL 764.15(1)(h); MSA 28.874(1)(h).

D. Suppressing Evidence After an Unlawful Arrest

An illegal arrest does not automatically preclude the prosecutor from bringing a prosecution. The appropriate remedy is to suppress the evidence obtained as a result of the arrest. If the prosecution still has sufficient evidence not tainted by the illegal arrest, the case may proceed to trial. *People v Spencely*, 197 Mich App 505, 508 (1992), citing *Wong Sun v United States*, 371 US 471 (1963).

A warrantless arrest that violates statutory prerequisites will cause the suppression of evidence seized as a result of it only if it also fails to satisfy the constitutional requirements set forth in the Fourth Amendment. In *People v Lyon*, 227 Mich App 599 (1998), the Court of Appeals distinguished between “constitutionally invalid” and “statutorily invalid” arrests, and refused to apply the exclusionary rule to evidence seized pursuant to an arrest that was a “mere statutory violation.”

The defendant in *Lyon* was found arguing with another man outside of a vehicle parked on a highway exit ramp. When approached by police, the defendant admitted he had driven and parked the vehicle. He requested a preliminary breath test, which showed a blood alcohol content of 0.353 percent, and was arrested without a warrant for OUIL. The defendant then voluntarily submitted to a blood alcohol test, which revealed a 0.34 alcohol content. The defendant filed a motion in district court to suppress the evidence obtained after his arrest, including the results of the blood alcohol test. He asserted that his arrest on misdemeanor charges was illegal because the alleged offense was not committed in the officer’s presence. Moreover, defendant argued that the situation did not fit into the “accident” exception to the warrant requirement.* The Court of Appeals affirmed the district court’s denial of the defendant’s motion to suppress the evidence. The Court agreed that the arrest was

*The exception for parked vehicles in MCL 257.625a(1)(b); MSA 9.2325(1)(1)(b) was not in effect at the time at issue in this case.

“statutorily invalid” on the grounds asserted by the defendant. However, the Court further noted that to invoke the exclusionary rule, the defendant’s arrest must also have been “constitutionally invalid.” The constitutional validity of an arrest depends upon whether probable cause to arrest existed at the moment of the arrest; probable cause requires “only a probability or substantial chance of criminal activity, not an actual showing of criminal activity.” 227 Mich App at 611, citing *Illinois v Gates*, 462 US 213, 243 n 13 (1983). In this case, the Court held that the facts clearly support a finding that probable cause to arrest existed. Defendant smelled of alcohol, and had watery eyes, slurred speech, and poor balance. The other man at the scene told the officer that he had found defendant asleep behind the wheel of the vehicle, and the defendant admitted that he had driven the vehicle to the location where it was parked. 227 Mich App at 612.

E. Defendant Rights at Arrest

1. Fifth Amendment Privilege Against Self-Incrimination

An accused person has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation in order to protect the Fifth Amendment privilege against compulsory self-incrimination. *Miranda v Arizona*, 384 US 436 (1966). This right is subject to the following limitations:

- The Fifth Amendment right to counsel attaches only when **the accused is in custody**. *People v Bladel (After Remand)*, 421 Mich 39, 51 (1984), aff’d *Michigan v Jackson*, 475 US 625 (1986). See *Berkemer v McCarty*, 468 US 420, 434 (1983), in which a driver’s statements to a police officer made prior to the driver’s arrest for drunk driving were admissible into evidence despite the officer’s failure to read the *Miranda* warnings to the driver.

Note: An arrest occurs when there is a taking, seizing, or detaining of a person, either by touching or putting hands on him or her, or by any act that indicates the intent to take the person into custody and subjects the person to the actual control and will of the arresting officer. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested. *People v Gonzales*, 356 Mich 247, 253 (1959), citing 4 Am Jur, Arrest, §2. A police officer’s unarticulated plan regarding arrest has no bearing on the question whether a suspect is “in custody”; the only relevant inquiry is how a reasonable person in the suspect’s position would understand the situation. *People v Chinn*, 141 Mich App 92, 97 (1985).

- The Fifth Amendment right to counsel attaches only when **the accused is subjected to interrogation**. *People v Bladel, supra*. In *Pennsylvania v Muniz*, 496 US 582, 603–605 (1990), a drunk driving suspect was arrested and taken to a booking center without being advised of his *Miranda* rights. At the booking center, the suspect made several incriminating statements while refusing to submit to a

Breathalyzer examination and while performing physical sobriety tests. A majority of the U.S. Supreme Court held that the statements were admissible at trial because they were made voluntarily and not elicited in response to custodial interrogation. The majority found that the officers who communicated with the suspect in these contexts limited their remarks to providing instructions regarding the tests at issue; the officers' remarks did not call for verbal responses from the suspect except as to whether he understood the instructions.

- The privilege against self-incrimination protects the accused from being compelled to provide **evidence of a testimonial or communicative nature**, but not from being compelled to produce real or physical evidence. To be "testimonial," the communication must explicitly or implicitly relate a factual assertion or disclose information. *Pennsylvania v Muniz*, *supra*, 496 US at 588–589. In *Muniz*, a drunk driving suspect was arrested and taken to a booking center without being advised of his *Miranda* rights. The suspect's actions and voice were videotaped at the booking center, where he answered routine booking questions about his name, address, height, weight, eye color, date of birth, and age, stumbling over two responses. He was also asked (and was unable to give) the date of his sixth birthday. Both the audio and video portions of the videotape were later admitted into evidence at trial. A majority of the U.S. Supreme Court held that the suspect's Fifth Amendment rights were violated by the admission of that part of the videotape in which the suspect could not give the date of his sixth birthday, because the content of his answer was a testimonial response supporting an inference that his mental state was confused. 496 US at 599. However, the Court's majority upheld the admission of those portions of the videotape showing the suspect's slurred speech while answering routine booking questions, finding that the suspect's lack of muscular coordination was not a testimonial component of his responses to questions. 496 US at 590–591.
- A plurality of the U.S. Supreme Court has held that the *Miranda* protections do not attach to **routine booking questions** asked for record-keeping purposes, which are reasonably related to police administrative concerns. Such questions may be asked to secure the biographical data necessary to complete booking or pretrial services, and include a suspect's name, address, height, weight, eye color, date of birth, or age. *Pennsylvania v Muniz*, *supra*, 496 US at 601–602.

2. Sixth Amendment Right to Counsel

The right to counsel attaches at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment. The accused is entitled to counsel not only at trial, but at all "critical states" of the prosecution, i.e., those stages where counsel's absence might derogate from the accused's right to a fair trial. Regardless of whether the accused is in custody or subjected to formal

interrogation, the Sixth Amendment right to counsel exists whenever the police attempt to elicit incriminating statements. This right to counsel does not depend on a request by the accused and courts indulge in every reasonable presumption against waiver. *People v Bladel (After Remand)*, 421 Mich 39, 52 (1984), aff'd *Michigan v Jackson*, 475 US 625 (1986).

The Michigan Court of Appeals has held that the Sixth Amendment does not provide the accused with a right to counsel in deciding whether to submit to a Breathalyzer test. *Ann Arbor v McCleary*, 228 Mich App 674, 678 (1998). However, a drunk driving suspect should be given a reasonable opportunity to telephone an attorney before making this decision, as a “commendable police practice.” *Hall v Secretary of State*, 60 Mich App 431, 441 (1975). See also *Holmberg v 54—A District Judge*, 60 Mich App 757, 760 (1975).

The Court of Appeals has refused to extend the *Hall* decision to protect the privacy of attorney-client communications prior to administration of a Breathalyzer test. In *Ann Arbor v McCleary*, *supra*, 228 Mich App at 681, the Court held that it was no violation of the right to counsel where police would not allow a private meeting between a drunk driving suspect and his attorney prior to administration of a Breathalyzer test.

2.3 Chemical Tests Under the Vehicle Code’s “Implied Consent” Provisions — §625c

MCL 257.625c(1); MSA 9.2325(3)(1) provides that persons who operate vehicles in Michigan give implied consent to chemical tests of their blood, urine, or breath when arrested for certain drunk driving violations listed in the statute. Tests administered pursuant to §625c are subject to specific requirements set forth in MCL 257.625a(6); MSA 9.2325(1)(6). Refusal to submit to a chemical test under these “implied consent” provisions of the Vehicle Code can result in licensing sanctions pursuant to MCL 257.625g; MSA 9.2325(7).

This section addresses the following issues arising under the Vehicle Code’s “implied consent” provisions:

- The circumstances under which a person is deemed to have given implied consent to chemical testing under §625c.
- The requirements for administering chemical tests under §625a(6).
- Issuance of a temporary license where a chemical test reveals an unlawful alcohol content.
- Procedures that apply when a person refuses to submit to a chemical test.
- Licensing sanctions for unlawful failure to submit to a chemical test.

For discussion of arrests in drunk driving cases generally, see Section 2.2. Search warrants for chemical tests are discussed in Section 2.4. The admissibility at trial of evidence based on chemical tests conducted pursuant to §625a(6) is addressed in Section 2.8(B).

Note: A chemical test of a person’s blood, urine, or breath pursuant to §625a(6) should be distinguished from a preliminary chemical breath analysis under §625a(2), which occurs prior to arrest. A discussion of this type of test appears at Sections 2.1(B) and 3.8.

A. Applicability of §625c

A person is considered to have consented to chemical tests of the blood, breath, or urine for purposes of determining the amount of alcohol and/or the presence of a controlled substance in the body when the following prerequisites of MCL 257.625c(1); MSA 9.2325(3)(1) are met:

- The person operated a vehicle upon a Michigan highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles;* and,
- The person is arrested for one of the following offenses:
 - OUIL/OUID/UBAC under §625(1).
 - OWI under §625(3).
 - OUIL/OUID/UBAC/OWI causing death or serious impairment of a body function under §625(4) or (5).
 - Zero tolerance violations under §625(6).
 - Child endangerment under §625(7).
 - Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).
 - Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
 - Violation of a local ordinance substantially corresponding to §625(1), (3), or (6), §625a(5) or §625m.
 - Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, *if* the police had reasonable grounds to believe the driver was operating the vehicle: 1) while impaired by or under the influence of alcohol and/or a controlled substance; 2) with an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine; or, 3) in violation of the zero tolerance provisions of §625(6).

Persons afflicted with hemophilia, diabetes, or a condition requiring them to use an anticoagulant under a physician’s direction are not considered to have

*See Section 1.4 for definitions of “generally accessible to motor vehicles,” “operating,” and “controlled substance.”

given consent to the withdrawal of blood. MCL 257.625c(2); MSA 9.2325(3)(2).

In *People v Borchard-Ruhland*, __ Mich __ (No. 112436, July 1, 1999), the Michigan Supreme Court held that only those persons who have been *arrested* fall within the purview of MCL 257.625c; MSA 9.2325(3). If a blood sample is taken from a person at a police officer's request *prior to* his or her arrest on drunk driving charges, the validity of the person's consent to giving the sample must be evaluated pursuant to the search and seizure principles under US Const, Am IV, and Const 1963, art 1, §11. In so holding, the Court rejected the contention that the implied consent statute is presumed to apply to *all* chemical testing, and refused to require officers seeking a blood alcohol test to expressly disclaim reliance on the statute in order to overcome the presumption.

When a blood sample is taken pursuant to a search warrant, the implied consent statute does not apply.* The warrant process exists independently of the testing procedures set forth in the implied consent statute. *People v Jagotka*, 232 Mich App 346, 353 (1998), *Manko v Root*, 190 Mich App 702 (1991).

*See Section 2.4 on search warrants for chemical testing.

The implied consent statute also does not apply to blood tests taken for medical treatment after an accident. See MCL 257.625a(6)(e)–(f); MSA 9.2325(1)(6)(e)–(f) and Section 2.4(B)(1).

B. Administering Chemical Tests Under §625c

Administration of chemical tests under §625c is governed by MCL 257.625a(6); MSA 9.2325(1)(6). This subsection addresses the advice that police must give to the person arrested, and the manner of conducting chemical tests. MCL 257.625g; MSA 9.2325(7) sets forth procedures that apply during the time pending the outcome of test results, and after the test results have been received.

1. Advice That Must Be Given the Person Arrested

MCL 257.625a(6)(b); MSA 9.2325(1)(6)(b) requires that a person arrested for one of the crimes described in §625c(1)* shall be advised of all of the following:

*These crimes are listed at Section 2.3(A).

- Those who submit to a chemical test at the request of an officer have the right to demand that the test be administered by a person of their choosing.
- The results of the chemical test are admissible in a judicial proceeding and will be considered with other admissible evidence in determining the person's innocence or guilt.
- The person is responsible for obtaining a chemical analysis of a test sample obtained at his or her own request.

- If the person refuses to take a chemical test at the officer's request, it may not be given without a court order. The arresting officer may seek a court order.
- Refusal of an officer's request to take a chemical test will result in suspension of the person's driver's license and six points added to the person's driving record.

In addition to the statutory notices that must be given under §625a(6)(b), persons arrested for drunk driving must be informed of any police administrative rules that materially affect their decisions regarding chemical tests. In *People v Castle*, 108 Mich App 353 (1981), police arrested the defendant for OUIL, advised him of his rights under the implied consent statute, and asked him to take a Breathalyzer test. The defendant refused to take the test without first consulting his attorney. An hour and ten minutes later, the attorney arrived and asked that defendant be given the Breathalyzer test. The police refused to administer the test, citing a departmental policy not to give a test if more than one hour elapsed since the request for it. Because the defendant had not been informed of this policy, he moved to dismiss the charges against him. The Court of Appeals held that the charges should be dismissed, stating that "...any person charged with [OUIL] must be informed of police regulations and rules, if any, that materially affect him to insure that the accused has an opportunity to make an informed decision." 108 Mich App at 357.

In *People v Borchard-Ruhland*, __ Mich __ (No. 112436, July 1, 1999), the Michigan Supreme Court held that the foregoing advice need only be given to persons who have been *arrested* for one of the crimes described in §625c(1). Blood samples taken at a police officer's request *prior to* an arrest for drunk driving fall outside the purview of §625c and the notice requirements of §625a(6)(b). In cases not governed by §625c, the validity of a person's consent to a chemical test requested by an officer must be evaluated pursuant to the search and seizure principles under US Const, Am IV, and Const 1963, art 1, §11.

A chemical analysis of blood drawn after an accident for purposes of medical treatment may be admitted into evidence in a civil or criminal proceeding regardless of whether the person from whom it was taken was advised of his or her rights under the implied consent statute. See MCL 257.625a(6)(e)–(f); MSA 9.2325(1)(6)(e)–(f).

2. Manner of Conducting Chemical Tests

A police officer who requests a chemical test from a person must have reasonable grounds to believe that the person has committed a crime described in §625c(1).^{*} MCL 257.625a(6)(d); MSA 9.2325(1)(6)(d). A sample or specimen of urine or breath must be taken and collected in a reasonable manner. A blood sample may only be taken by a licensed physician or a person operating under the delegation of a licensed physician who is qualified to

^{*}These crimes are listed at Section 2.3(A).

withdraw blood and acting in a medical environment at a police officer's request. MCL 257.625a(6)(c); MSA 9.2325(1)(6)(c).

A person arrested for committing a crime described in §625c(1) must be given a reasonable opportunity to have someone of his or her own choosing administer a blood, urine, or breath test within a reasonable time of the arrest. Persons who exercise this right are responsible for obtaining a chemical analysis of the test sample. MCL 257.625a(6)(d); MSA 9.2325(1)(6)(d). In *People v Underwood*, 153 Mich App 598 (1986), the Court of Appeals reversed a defendant's OUIL conviction because he was denied the statutory right to have an independent blood test. The *Underwood* defendant made two clear requests for an alternative blood test at the scene of his arrest and at the police station. Police officers talked him out of the independent test by telling him it would show a higher blood alcohol level and that he would go to jail anyway. The Court of Appeals reversed defendant's conviction on charges of OWI-2d offense, concluding that even though the defendant was persuaded by the officers' remarks, he was deprived of an opportunity to obtain exculpatory evidence by an independent blood test. 153 Mich App at 600.

The Department of State Police has promulgated uniform rules for the administration of chemical tests under §625a(6). These can be found at 1994 AACS, R 325.2651 et seq. and 1993 AACS, R 325.2671 et seq. Persons arrested for drunk driving must be informed of any police administrative rules that materially affect their decisions regarding chemical tests. See *People v Castle*, 108 Mich App 353 (1981), discussed at Section 2.3(B)(1).

3. Procedures Pending Results of a Chemical Test

If the results of a chemical test under §625a(6) are not immediately available, the police officer who requested the test shall confiscate the driver's license or permit of the person tested pending receipt of the results. The officer shall issue the person a temporary license or permit, if the person is otherwise eligible for a license or permit. The officer shall immediately notify the person of the test results; if they do not reveal an unlawful alcohol content, the officer shall immediately return the person's license or permit by first class mail. MCL 257.625g(2); MSA 9.2325(7)(2).

Under MCL 257.625g(4); MSA 9.2325(7)(4), "unlawful alcohol content" means any of the following:*

- If the person tested is less than 21 year old, 0.02 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- If the person tested was operating a commercial motor vehicle, 0.04 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- For all other persons, 0.10 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

*See Section 1.3 on changes to these standards that were proposed during the 1999 legislative session.

4. Disclosure to the Defendant of Evidence Gained from a Chemical Test

If a chemical test described in §625a(6) is administered, test results shall be made available to the defendant or his or her attorney upon written request to the prosecutor, with a copy of the request filed with the court. The prosecutor shall furnish the results at least two days before the date of the trial. The prosecutor shall offer the test results as evidence in the trial. Failure of the prosecutor to fully comply with the request bars the admission of the results into evidence by the prosecution. MCL 257.625a(8); MSA 9.2325(1)(8).

In *People v Stoney*, 157 Mich App 721, 725 (1987), the Court of Appeals held that it is the *results* of a blood test that must be disclosed to a drunk driving defendant pursuant to §625a, not blood samples themselves. The defendant in *Stoney* was charged with felonious driving as a result of a one-car accident. The police officers found defendant bleeding and incoherent at the scene and took him to a hospital, where they requested staff to conduct a blood alcohol test. The hospital staff complied, and then discarded all of defendant's blood samples after seven days. Defendant made a motion to dismiss the charge and/or to suppress the test results on the basis that blood samples were evidence that must be made available to defendant so that he could have them independently tested in order to impeach the state's test results. The Court of Appeals disagreed with the defendant, holding that the results of the blood test, not the blood samples themselves, are admissible in court; therefore, only the test results must be made available to defendants.

In a similar case, the Court of Appeals held that the routine discarding of non-reusable Breathalyzer test ampoules by police officers does not constitute an impermissible suppression of evidence. *People v Tebo*, 133 Mich App 307 (1984). The Court in *Tebo* reasoned that because the defendant can have an independent chemical test conducted under the implied consent statute, none of the defendant's rights are compromised by destruction of the state's test ampoules.

Note: The rules expressed in *Stoney* and *Tebo*, *supra*, do not apply if the blood sample at issue was taken pursuant to a search warrant. In *People v Jagotka*, 232 Mich App 346 (1998), a defendant arrested for OUIL refused to submit to a Breathalyzer test under the implied consent statute, and was given a blood test pursuant to a search warrant. The blood sample was destroyed pursuant to police department policy, and the prosecutor provided the defendant with a copy of the test results. The defendant moved to suppress the test results, arguing that the destruction of the blood sample violated MCL 780.655(5); MSA 28.1259(5). That statute provides that property seized under a search warrant "shall be safely kept...so long as necessary for the purpose of being produced or used as evidence on any trial." Noting that the warrant process exists independently of the testing procedures set forth in the implied consent statute, the Court of Appeals agreed that the destruction of defendant's blood sample violated MCL 780.655(5); MSA 28.1259(5). 232 Mich App at 353, 355. Because the violation prejudiced the defendant by preventing him from conducting an

independent analysis of the sample, the Court held that he was entitled to an adverse inference instruction to the jury, i.e., that it could infer that evidence unpreserved because of the violation would have favored the defendant. 232 Mich App at 355–356.

5. License Confiscation Where a Chemical Test Reveals an Unlawful Alcohol Content

If a person submits to a chemical test under §625a(6), or such a test is performed pursuant to a court order, and the test reveals an unlawful alcohol content, the police officer who requested the person to submit to the test shall do all of the following, as required by MCL 257.625g(1); MSA 9.2325(7)(1):

- Immediately confiscate the person’s license or permit to operate a motor vehicle, and issue a temporary license or permit if the person is otherwise eligible for a license or permit.
- Notify the Secretary of State by means of the law enforcement information network that a temporary license or permit was issued to the person.
- Destroy the person’s license or permit.

Under MCL 257.625g(4); MSA 9.2325(7)(4), “unlawful alcohol content” means any of the following:*

- If the person tested is less than 21 year old, 0.02 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- If the person tested was operating a commercial motor vehicle, 0.04 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- For all other persons, 0.10 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

The temporary license or permit issued under §625g is valid for one of these time periods provided by MCL 257.625g(3); MSA 9.2325(7)(3):

- If the case is not prosecuted, for 90 days after issuance or until the person’s license or permit is suspended under MCL 257.625f; MSA 9.2325(6) (the implied consent hearing statute), whichever occurs earlier. The prosecutor shall notify the Secretary of State if a case referred for prosecution is not prosecuted; the arresting police agency shall notify the Secretary of State if a case is not referred for prosecution.
- If the case is prosecuted, until the criminal charges are dismissed, the person is acquitted, or the person’s license or permit is suspended, restricted, or revoked.

*See Section 1.3 on changes to these standards that were proposed during the 1999 legislative session.

*Notice of the person's refusal to submit to testing is required by MCL 257.625d; MSA 9.2325(4).

C. Procedures in Cases Where a Driver Refuses to Submit to a Chemical Test

1. Confiscation of Driver's License Upon Refusal to Submit to Test

If a person refuses to take a chemical test under §625a(6), the police officer who requested the person to submit to the test shall do all of the following, as required by MCL 257.625g(1); MSA 9.2325(7)(1):

- Immediately confiscate the person's license or permit to operate a motor vehicle, and issue a temporary license or permit if the person is otherwise eligible for a license or permit.
- Notify the Secretary of State by means of the law enforcement information network that a temporary license or permit was issued to the person, and that the person refused to submit to a chemical test.*
- Destroy the person's license or permit.

The temporary license or permit issued under §625g is valid for one of these time periods provided by MCL 257.625g(3); MSA 9.2325(7)(3):

- If the case is not prosecuted, for 90 days after issuance, or until the person's license or permit is suspended under MCL 257.625f; MSA 9.2325(6) (the implied consent hearing statute), whichever is earlier. The prosecutor shall notify the Secretary of State if a case referred for prosecution is not prosecuted; the arresting police agency shall notify the Secretary of State if a case is not referred to the prosecutor for prosecution.
- If the case is prosecuted, until the criminal charges are dismissed, the person is acquitted, or the person's license or permit is suspended, restricted, or revoked.

2. Notice of Right to Request Hearing — Sanctions Upon Failure to Request Hearing

If a person refuses a police officer's request to submit to a chemical test offered pursuant to §625a(6), the test shall not be given without a court order. The police officer may seek to obtain a court order. MCL 257.625d(1); MSA 9.2325(4)(1). The officer must also notify the person in writing that he or she has 14 days from the date of the notice to request a hearing. The notice shall state that: 1) failure to request a hearing within 14 days will result in the suspension of the person's license or permit; and, 2) there is no requirement that a person retain counsel for the hearing, although counsel would be permitted to represent the person at the hearing. MCL 257.625e; MSA 9.2325(5).

If the person fails to request a hearing within the required 14 day period, the Secretary of State will impose a six month suspension or denial of the person's

license. For a second or subsequent refusal within seven years, this period is increased to one year. MCL 257.625f(1)(a); MSA 9.2325(6)(1)(a).

3. Procedures Where Hearing Requested

When requested, implied consent hearings are conducted before a hearing officer appointed by the Secretary of State. A hearing must be held within 45 days after the driver's arrest, upon five days notice to the parties. There are, however, no sanctions for failure to comply with the statutory time limits for holding the hearing. MCL 257.625f(2), 257.322; MSA 9.2325(6)(2), 9.2022.

Under MCL 257.625f(3); MSA 9.2325(6)(3), an implied consent hearing must be finally adjudicated within 77 days after the driver's arrest. There are, however, no sanctions for failure to comply with this statutory time limit. Section 625f(3) provides the following exceptions to the 77 day time limit:

- Delay attributable to the unavailability of the defendant, a witness, or material evidence.
- Delay due to an interlocutory appeal.
- Delay due to exceptional circumstances.

The statute specifically provides that delay caused by docket congestion does not constitute an exception to the 77 day rule.

Under MCL 257.625f(4); MSA 9.2325(6)(4), the hearing shall cover only the following issues:

- Whether the police officer had reasonable grounds to believe that the driver had committed a crime described in §625c(1).*
- Whether the driver was arrested for a crime described in §625c(1).
- Whether the driver's refusal to submit to the chemical test was reasonable.
- Whether the driver was advised of his or her rights under §625a(6).*

*These crimes are listed at Section 2.3(A).

*These rights are described at Section 2.3(B)(1).

A person shall not order a hearing officer to make a particular finding on any of the foregoing issues. MCL 257.625f(5); MSA 9.2325(6)(5).

Hearing procedures are set forth in MCL 257.322; MSA 9.2022. The hearing officer must make a record of the hearing, which shall be prepared and transcribed in accordance with MCL 257.322(4) and 257.323; MSA 9.2022(4) and 9.2023

If the person requesting the hearing does not prevail, the Secretary of State shall impose a six month suspension or denial of the person's license. For a second or subsequent refusal within seven years, this period is increased to one year. MCL 257.625f(7)(a); MSA 9.2325(6)(7)(a).

*§625d requires officers to file a report of a person's refusal to take a chemical test with the Secretary of State.

The Secretary of State will also assess six points on the driving record of a person whose license is suspended or denied under §625f. However, if a conviction, civil infraction determination, or juvenile court disposition results from the same incident, additional points for that offense shall not be entered. MCL 257.320a(8); MSA 9.2020(1)(8).

4. Judicial Review of the Hearing Officer's Determination

MCL 257.323; MSA 9.2023 governs appeals from the hearing officer's determination in an implied consent hearing. MCL 257.625f(6), (8); MSA 9.2325(6)(6), (8).

Appeals may be taken by the person who requested the hearing or the officer who filed the report under §625d.* Officers petitioning for review must do so with the consent of the prosecutor. MCL 257.625f(8); MSA 9.2325(6)(8).

MCL 257.323(1); MSA 9.2023(1) provides that appeals from implied consent hearings are taken to the circuit court in the county where the arrest was made. The aggrieved party must file the petition for review within 63 days after the hearing officer's determination is made; however, for good cause shown, this period may be extended to 182 days after the determination.

Once the petition for review is filed, the circuit court must enter an order setting the case for hearing on a day certain not more than 63 days after the date of the order. The order, the petition for review, and all supporting affidavits must be served on the Secretary of State's office in Lansing. The petition must include the driver's full name, address, birth date, and driver's license number. Service must be made not less than 20 days before the hearing date, unless the driver is seeking a review of the record. In the latter case, service must be made not less than 50 days before the hearing date in circuit court. MCL 257.323(2); MSA 9.2023(2).

Upon notification of the filing of a petition for review, and not less than ten days before the matter is set for hearing, the hearing officer shall transmit to the court the original or a certified copy of the official record of the proceedings. Proceedings at which evidence was presented need not be transcribed and transmitted if the sole reason for review is to determine whether the court will order the issuance of a restricted license. The parties may stipulate that the record be shortened. A party unreasonably refusing to stipulate to a shortened record may be taxed by the court for additional costs. The court may permit subsequent corrections to the record. MCL 257.625f(6); MSA 9.2325(6)(6).

For a first violation under §625f, the court may take testimony and examine all the facts and circumstances relating to the suspension of a driver's license. The court may affirm, modify, or set aside the suspension; however, it may not order the Secretary of State to issue a restricted or unrestricted license that would permit a person to drive a commercial motor vehicle hauling a hazardous material. The petitioner shall file a certified copy of the court's order

with the Secretary of State's office in Lansing within seven days after entry of the order. MCL 257.323(3); MSA 9.2023(3).

For sanctions imposed after second or subsequent violations under §625f, the scope of judicial review is more limited. Under MCL 257.323(4); MSA 9.2023(4), the court shall confine its consideration to a review of the administrative hearing or driving records for a statutory legal issue, and shall not grant restricted driving privileges. The court shall set aside the hearing officer's determination only if the petitioner's substantial rights have been prejudiced because the determination is any of the following:

- In violation of the U.S. Constitution, the Michigan Constitution, or a statute.
- In excess of the Secretary of State's statutory authority or jurisdiction.
- Made upon unlawful procedure resulting in material prejudice to the petitioner.
- Not supported by competent, material, and substantial evidence on the whole record.
- Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.
- Affected by other substantial and material error of law.

D. Admission of Refusal into Evidence at Trial

A person's refusal to submit to a chemical test under the implied consent provisions of the Vehicle Code is admissible in a criminal prosecution for a crime described in §625c(1) only to show that a test was offered to the defendant, but not as evidence in determining the defendant's guilt or innocence. The jury shall be instructed accordingly. MCL 257.625a(10); MSA 9.2325(1)(10). A jury instruction on the defendant's decision to forgo chemical testing appears at CJI2d 15.9.*

*The crimes described in §625c(1) are listed at Section 2.3(A). See Section 1.3 for proposed amendments to §625a(10) during the 1999 legislative session.

2.4 Search Warrants for Chemical Testing

A person arrested for a drunk driving offense described in §625c(1) is considered to have consented to chemical tests of the blood, breath, or urine for purposes of determining the amount of alcohol and/or the presence of a controlled substance in the body. MCL 257.625c(1); MSA 9.2325(3)(1). However, if a person refuses a police officer's request to submit to a chemical test, the test shall not be given without a court order. The police officer may seek to obtain a court order, which often takes the form of a search warrant. MCL 257.625d(1); MSA 9.2325(4)(1).* This section addresses procedures and due process concerns regarding the issuance of search warrants for chemical tests in drunk driving cases. The discussion also covers exceptions to search warrant requirements and situations where a defendant refuses to comply with a search warrant. For a more complete discussion of search warrants generally,

*See Section 2.3(A) for a list of crimes described in §625c(1). A complete discussion of the implied consent statute appears at Section 2.3.

see Michigan Judicial Institute, *Issuance of Search Warrants* (Criminal Benchbook Series, Monograph 2, 1992).

Note: When a blood sample is taken pursuant to a search warrant, the implied consent statute does not apply. *Manko v Root*, 190 Mich App 702 (1991).

A. Issuance of a Search Warrant — Substance and Procedures

1. Establishing Probable Cause

MCL 780.653; MSA 28.1259(3) requires that a magistrate's reasonable or probable cause finding in issuing a search warrant "shall be based upon all the facts related within the affidavit made before him or her." Oral testimony may not be used to supplement the information contained in the affidavit. In *People v Sloan*, 450 Mich 160 (1995), the Michigan Supreme Court considered a case where a search warrant was issued for a blood test of a defendant charged with OUIL causing death. The affidavit submitted in support of the warrant contained mere conclusions; however, the magistrate issued the warrant after hearing the affiant officer's sworn oral testimony as to the defendant's physical condition at the scene of the accident giving rise to the charges. The trial court denied the defendant's motion to suppress the test results obtained under the warrant, and the defendant appealed. A majority of the Supreme Court held that the test results should have been suppressed because the search warrant was invalid. In response to the prosecutor's argument that probable cause to issue the warrant existed when the conclusions in the affidavit were considered together with the affiant's oral testimony, the Court held:

"[W]hen reviewing courts assess a magistrate's probable cause determination, they may *not* consider sworn, yet unrecorded oral testimony that, contemporaneous with an affidavit, is offered to the magistrate to show probable cause. Our primary reason for so holding is our belief that requiring reviewing courts to consider sworn, yet unrecorded, oral testimony would impose a significant and unnecessary burden on their ability to reliably assess whether the constitutional requirement for probable cause had been satisfied." 450 Mich at 173. [Emphasis in original.]

2. Scope of Search Authorized by Warrant

In *People v Mayhew*, __ Mich App __ (No. 202997, June 8, 1999), the Court of Appeals upheld the trial court's refusal to suppress results of a urine test that showed the presence of a controlled substance in the body of a defendant charged with felonious driving and other related offenses. After the auto accident giving rise to the charges in this case, the defendant was hospitalized and a search warrant issued for his blood test results. Although the warrant specified only the blood test results, the hospital released the results of a urine test that showed the presence of the active ingredient in marijuana. This

evidence was admitted over defendant's objection at trial. On appeal from his conviction, defendant asserted that the search warrant was limited to blood test results, so that his urine test results were beyond its scope. The Court rejected defendant's assertion that the search warrant for blood test results precluded admission of results of other types of medical tests. Citing *People v Perlos*, 436 Mich 305 (1990), the Court found that the defendant had no reasonable expectation of privacy with respect to the results of his urine test; accordingly, he had no standing to challenge the government's action in securing the results from the hospital. (*People v Perlos* is discussed at Section 2.4(B)(1).)

3. Issuance Procedures

Usually, a police officer rather than a prosecutor drafts the affidavit in support of a request for a search warrant to obtain a blood test. Therefore, the affidavit and warrant should be carefully reviewed. The following are the recommended steps:*

1. Determine whether the time of day that defendant was driving is mentioned in the affidavit.
2. Determine that the person to be searched is described with particularity.
3. Determine that the sample to be seized is described with particularity.
4. Determine that the requested sample will be drawn by a licensed physician or a person working under the delegation of a licensed physician who is qualified to withdraw blood and acting in a medical environment.
5. Determine whether the affidavit establishes reasonable grounds to believe that the person has committed one of the following offenses:
 - OUIL/OUID/UBAC under Vehicle Code §625(1).
 - OWI under Vehicle Code §625(3).
 - OUIL/OUID/UBAC OWI causing death or serious impairment of a body function under §625(4) or (5) of the Vehicle Code.
 - A zero tolerance violation under §625(6) of the Vehicle Code.
 - Child endangerment under §625(7) of the Vehicle Code.
 - Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5) of the Vehicle Code.
 - Operating a commercial motor vehicle with an unlawful bodily alcohol content under Vehicle Code §625m.
 - Violation of a local ordinance substantially corresponding to Vehicle Code §625(1), (3), or (6), §625a(5), or §625m.
 - Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, if the police had

*The listed steps are based on Const 1963, Art 1, §11, MCL 257.625a(6); MSA 9.2325(1)(6), MCL 780.651; MSA 28.1259(1), and MCL 780.653 – 780.655; MSA 28.1259(3) – (5).

reasonable grounds to believe the driver was operating the vehicle:
a) while impaired by or under the influence of alcohol and/or a controlled substance; b) with an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine; or, c) in violation of the zero tolerance provisions of §625(6).

6. If the affidavit is based on information supplied to affiant by a named person, such as another police officer, determine that the affidavit contains affirmative allegations from which the magistrate may conclude that the named person spoke with personal knowledge of the information.
7. If the affidavit is based on information supplied to affiant by an unnamed person, determine that the affidavit contains affirmative allegations from which the magistrate may conclude that:
 - The unnamed person spoke with personal knowledge; and,
 - The unnamed person is credible, or that the information is reliable.
8. Place the affiant under oath, and ask if the averments in the affidavit are true to the best of the affiant's information and belief.
9. Have the affiant sign the affidavit. See *People v Mitchell*, 428 Mich 364, 369 (1987), holding that a search warrant based upon an unsigned affidavit is presumed invalid; however, the prosecutor may rebut the presumption by a showing that the affidavit was made on oath to a magistrate.
10. Sign and date the affidavit and all copies of the search warrant. See *People v Barkley*, 225 Mich App 539, 545 (1997), holding that the lack of a judge's or magistrate's signature on a search warrant raises a presumption that the warrant is invalid. This presumption may be rebutted with evidence that the magistrate or judge in fact determined that the search was warranted and intended to issue the warrant before the search.
11. Retain the original affidavit and the appropriate copy of the warrant.
12. Direct the officer in charge to leave a completed copy of the search warrant with the person searched.
13. Ensure that a completed tabulation is promptly filed with the court after execution of the search.

4. Issuance of a Search Warrant by Electronic or Electromagnetic Devices

Under MCL 780.651(2); MSA 28.1259(1)(2), an affidavit for a search warrant may be made by any electronic or electromagnetic means of communication if both of the following occur:

- The judge or district court magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits the affidavit; and,
- The affiant signs the affidavit. Proof that the affiant signed the affidavit may consist of an electronically or electromagnetically transmitted facsimile of the signed affidavit.

Under MCL 780.651(3); MSA 28.1259(1)(3), a written search warrant for a blood test under Vehicle Code §625a may be issued in person or by any electronic or electromagnetic means of communication by a judge or by a district court magistrate. The officer receiving an electronically or electromagnetically issued search warrant must receive proof of the issuing judge's or magistrate's signature before executing the warrant. Proof of this signature may consist of an electronically or electromagnetically transmitted facsimile of the signed warrant. MCL 780.651(4); MSA 28.1259(1)(4).

If an oath or affirmation is orally administered by electronic or electromagnetic means of communication, the oath or affirmation is considered to be administered before the judge or district court magistrate. MCL 780.651(6); MSA 28.1259(1)(6). See also Administrative Order 1990–9.

If an affidavit for a search warrant or the warrant itself is submitted by electronic or electromagnetic means of communication, the transmitted copies of the affidavit or warrant are duplicate originals, and are not required to contain an impression made by an impression seal. MCL 780.651(7); MSA 28.1259(1)(7).

Administrative Order 1990–9 addresses voice and facsimile communication equipment for the transmission and filing of court documents. Pursuant to this Order, a court may promulgate local rules governing the filing of facsimile documents.

B. Exceptions to Search Warrant Requirement

1. Blood Tests Taken After an Accident for Medical Treatment

Search warrant requirements do not apply to blood tests taken for medical treatment after an accident. MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e) provides that if a driver is transported to a medical facility and a blood sample is withdrawn for medical treatment, the results of a chemical analysis are admissible in any civil or criminal proceeding to show the amount of alcohol and/or presence of a controlled substance in the person's blood at the time of

the accident, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecutor who requests them for use in a criminal prosecution. The Michigan Supreme Court has held that MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e) renders the results of blood tests admissible at trial irrespective of whether the physician-patient privilege was waived or a valid search warrant was obtained. *People v Keskimaki*, 446 Mich 240, 247 (1994).

See also *People v Perlos*, 436 Mich 305 (1990), in which the Supreme Court upheld the constitutionality of former MCL 257.625a(9); MSA 9.2325(1)(9), now MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e), finding that: 1) blood withdrawn for medical treatment does not implicate the Fourth Amendment because there is no state involvement in the withdrawal, 436 Mich at 315–316; and, 2) the state’s warrantless acquisition of such tests does not violate the Fourth Amendment because intoxicated drivers involved in accidents have no reasonable expectation of privacy in blood alcohol test results, 436 Mich at 330.

Note: If a driver is deceased after an accident, a blood sample shall be withdrawn in a manner directed by the medical examiner to determine the amount of alcohol and/or presence of a controlled substance. The medical examiner shall give the results of the chemical analysis to the law enforcement agency investigating the accident; that agency shall forward the results to the Department of State Police. MCL 257.625a(6)(f); MSA 9.2325(1)(6)(f).

In *People v Keskimaki*, *supra*, the Supreme Court considered the meaning of the word “accident” in the context of former MCL 257.625a(9); MSA 9.2325(1)(9), now MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e). The defendant in *Keskimaki* was observed in his vehicle, which was lawfully parked on the shoulder of the road. Defendant was slumped over the steering wheel, apparently unconscious and breathing erratically. When officers failed to rouse the defendant, he was taken to the hospital, where his blood alcohol content proved to be greater than 0.10. In response to charges of OUIL, the defendant moved to suppress evidence of his blood test results, which had been offered into evidence under the accident exception to the implied consent statute. The trial court denied the defendant’s motion to suppress, and the defendant appealed. The Supreme Court held that the test results should have been suppressed because no “accident” had occurred. In so holding, the Court declined to propound a general definition of “accident” for purposes of the statute. Instead, it set forth the following “relevant factors” for determining whether an “accident” has occurred:

“[W]e believe consideration should be given to whether there has been a collision, whether personal injury or property damage has resulted from the occurrence, and whether the incident either was undesirable for or unexpected by any of the parties directly involved. While we do not intend this to be an

exhaustive list of factors to be considered, included are those that we believe will appear with frequency in true ‘accidents’” 446 Mich at 255–256.

Applying the foregoing factors, the Court concluded that the defendant had not been involved in an accident based on the fact that the defendant’s vehicle was found lawfully parked on the shoulder of the road, with its headlights on and its motor running. Tire tracks in the snow indicated that the vehicle had traveled in a straight line following its departure from the road. There was no sign of a collision, no evidence of property damage, and no apparent injury, other than visible intoxication. *Id.*

2. Urine Tests Taken After an Accident

The Court of Appeals has noted that the accident exception in MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e) is not applicable to chemical analyses of urine samples. *People v Mayhew*, __ Mich App __ (No. 202997, June 8, 1999). Nonetheless, the panel in *Mayhew* upheld the trial court’s refusal to suppress results of a urine test that showed the presence of a controlled substance in the body of a defendant charged with felonious driving and other related offenses. After the auto accident giving rise to the charges in this case, the defendant was hospitalized and a search warrant issued for his blood test results. Although the warrant specified only the blood test results, the hospital released the results of a urine test that showed the presence of the active ingredient in marijuana. This evidence was admitted over defendant’s objection at trial. On appeal from his conviction, defendant asserted that: 1) the urine test results were inadmissible under MCL 257.625a(6)(a); MSA 9.2325(1)(6)(a), because the more specific provisions governing blood tests in MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e) created an exception to the subsection (6)(a) provisions; and, 2) the search warrant was limited to blood test results, so that the urine test results were beyond its scope.

The Court of Appeals rejected the defendant’s first assertion, finding no incompatibility between subsections (6)(a) and (6)(e):

“[S]ubsection (6)(a) clearly allows into evidence chemical analyses that show the amount of alcohol or presence of a controlled substance in a driver’s urine. Subsection (6)(e) says nothing whatsoever regarding urine tests and, accordingly, cannot be read as disallowing the admission into evidence of urine tests or otherwise contradicting or presenting a conflict with subsection (6)(a).”

The Court further rejected defendant’s assertion that the search warrant for blood test results precluded admission of results of other types of medical tests. Citing *People v Perlos*, 436 Mich 305 (1990),* the Court found that the defendant had no reasonable expectation of privacy with respect to the results

**People v Perlos* is discussed at Section 2.4(B)(1).

of his urine test; accordingly, he had no standing to challenge the government's action in securing the results from the hospital.

3. Defendant Voluntarily Consents to Blood Test

A defendant may voluntarily consent to administration of a blood test prior to arrest on drunk driving charges. In *People v Borchard-Ruhland*, __ Mich __ (No. 112436, July 1, 1999), the Michigan Supreme Court considered the admissibility of a blood sample taken without a warrant prior to the defendant's arrest on charges of OUIL causing serious impairment of a body function. Defendant had been taken to a hospital after the accident giving rise to the charges, where a police officer requested her to submit to blood testing. The defendant agreed to the test, but later protested the admission of the test results at her preliminary examination, asserting that she had not been advised of her rights under the implied consent statute, MCL 257.625a(6)(b); MSA 9.2325(1)(6)(b). She further asserted that a prior valid arrest is mandatory before a motorist may legally consent to blood alcohol testing.

*The court left for another day the issue whether the implied consent statute limits the authority of police to request voluntary chemical testing where the suspect has been arrested and falls within the ambit of the statute.

The Supreme Court found that because the defendant was not under arrest at the time the blood test was taken, the implied consent statute did not apply. Accordingly, the officer's failure to advise her of her rights under §625a(6)(b) did not render the test results inadmissible. Furthermore, the Court held that nothing in the relevant statutory provisions limited the authority of police to request voluntary chemical testing where the defendant was not under arrest.* The validity of the defendant's consent to the testing, and the admissibility of the test results, is governed by the conventional constitutional standards against unlawful searches and seizures found in the Fourth Amendment to the U.S. Constitution and Const 1963, art 1, §11. In determining whether the defendant's consent was freely and voluntarily given, the trial court must assess the totality of the circumstances. Knowledge of the right to refuse consent is not a prerequisite to effective consent, and the prosecution need not prove that the person giving consent knew of the right to withhold consent. Knowledge of the right to refuse is but one factor to consider in determining whether consent was voluntary under the totality of the circumstances.

C. Preservation of Evidence Obtained Pursuant to Search Warrant

In *People v Jagotka*, 232 Mich App 346 (1998), a defendant arrested for OUIL refused to submit to a Breathalyzer test under the implied consent statute, and was given a blood test pursuant to a search warrant. The blood sample was destroyed pursuant to police department policy, and the prosecutor provided the defendant with a copy of the test results. The defendant moved to suppress the test results, arguing that the destruction of the blood sample violated MCL 780.655(5); MSA 28.1259(5). That statute provides that property seized under a search warrant "shall be safely kept...so long as necessary for the purpose of being produced or used as evidence on any trial." Noting that the warrant process exists independently of the testing procedures set forth in the implied consent statute, the Court of Appeals agreed that the destruction of defendant's blood sample violated MCL 780.655(5); MSA 28.1259(5). 232 Mich App at

353. Because the violation prejudiced the defendant by preventing him from conducting an independent analysis of the sample, the Court held that he was entitled to an adverse inference instruction to the jury, i.e., that it could infer that evidence unpreserved because of the violation would have favored the defendant. 232 Mich App at 355–356.

D. Refusal to Comply with Search Warrant

1. Police Use Force to Obtain a Blood Sample

The Fourth Amendment does not necessarily prohibit police from using pain compliance techniques to obtain dissolvable evidence pursuant to a search warrant. To determine the reasonableness of a particular seizure, the court must balance the nature and quality of the intrusion on a person's Fourth Amendment interests against the countervailing governmental interests at stake. *People v Hanna*, 223 Mich App 466, 471 (1997), citing *Graham v Connor*, 490 US 386, 396 (1989). In *Hanna*, the Court of Appeals held that it was “objectively reasonable” under the circumstances of the case for police to use “Do-Rite sticks” to subdue an uncooperative defendant long enough for a hospital employee to draw blood as provided in a search warrant. The Court found that the police had a strong, legitimate interest in executing the warrant as soon as possible, and that the laboratory technician could not safely have drawn the defendant's blood unless the defendant ceased his combative conduct. Moreover, the intrusion on the defendant's person was not severe, unnecessary, or unduly intrusive; the defendant was so combative that handcuffs and bed restraints would not have been effective to immobilize him while his blood was drawn. 223 Mich App at 473. The Michigan Supreme Court denied leave to appeal in this case, its majority finding that “[t]he officers used a reasonable amount of force in light of the surrounding facts and circumstances” and that the Court of Appeals had properly applied the “objective reasonableness” test in *Graham v Connor*, *supra*. __ Mich __ (No. 109985(48), June 8, 1999).

2. Criminal Prosecution for Resisting and Obstructing an Officer

Persons who refuse to submit to a chemical test pursuant to a valid search warrant may be charged with resisting and obstructing an officer. In *People v Davis*, 209 Mich App 580 (1995), the defendants were arrested for OUIL. After the defendants refused to take Breathalyzer tests, police obtained valid search warrants to procure blood samples. When the defendants refused to allow a lab technician to draw their blood pursuant to the search warrants, they were charged with resisting and obstructing an officer under MCL 750.479; MSA 28.747. The circuit court dismissed these charges, finding that the refusal to cooperate with the lab technician did not interfere with the execution of the police officers' duties. The Court of Appeals reversed the dismissal of the charges, holding that the defendants had hindered the police officers in the execution of their duties by refusing to allow the lab technician to draw their blood. The Court found that the officers' duty to “keep the peace” included the

procurement of blood samples in enforcement of valid search warrants. 209 Mich App at 586.

*Vehicle immobilization is discussed in Section 2.11(A).

2.5 Registration Plate Confiscation for Repeat Offenders

MCL 257.904c(1); MSA 9.2604(3)(1) provides that when a police officer detains the driver of a vehicle for a violation of a law of this state or a local ordinance for which vehicle immobilization is required,* the officer shall immediately confiscate the vehicle's registration plate and destroy it. The officer shall then issue a temporary vehicle registration plate for the vehicle on a form provided by the Secretary of State, and notify the Secretary of State through the law enforcement information network. The temporary plate must remain on the vehicle until the violation is adjudicated or the vehicle is lawfully transferred to another person. MCL 257.219(3); MSA 9.1919(3).

A. Offenses Where Plate Confiscation Is Required

Registration plate confiscation is required upon detention for the following Vehicle Code §625 and §904 offenses for which immobilization is mandatory under MCL 257.904d(1)–(2); MSA 9.2604(4)(1)–(2):

- Any violation of §625(4) or (5) (OUIL/OUID/UBAC/OWI causing death or serious impairment of a body function).
- Any violation of §904(4) or (5) (DWLS causing death or serious impairment of a body function).
- A moving violation committed while driving with a suspended/revoked license and occurring within seven years of two or more prior suspensions, revocations, or denials imposed under §904(10), (11), or (12) (which impose additional licensing sanctions on persons who commit moving violations while driving with a suspended/revoked license).
- A violation of §625(1), (3), or (7) (OUIL, OUID, UBAC, OWI, or child endangerment) within seven years after one prior conviction or within ten years after two or more prior convictions of any of the following offenses under a Michigan law, or under a substantially corresponding local ordinance or law of another state:
 - OUIL/OUID/UBAC under §625(1).
 - OWI under §625(3).
 - OUIL/OUID/UBAC/OWI causing death or serious impairment of a body function under §625(4)–(5).
 - Zero tolerance violations under §625(6); however, only one such conviction may count as a prior conviction for purposes of plate confiscation.
 - Child endangerment under §625(7).
 - Operating a commercial motor vehicle with an unlawful bodily alcohol content, under §625m.

*The listed prior convictions are taken from Vehicle Code §904d(8).

- Former §625(1) or (2) or former §625b. Former §625(1) provided criminal penalties for OUIL and OUID. Former §625(2) prohibited driving with a blood alcohol content of 0.10 percent or more. Former §625b provided criminal penalties for OWI.
- Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

Note: Registration plate confiscation under the foregoing provisions should be distinguished from plate cancellation under MCL 257.904(3); MSA 9.2604(3). That statute authorizes the Secretary of State to cancel a vehicle's registration plate upon receipt of notice from a police officer that the driver has committed a first or second violation of Vehicle Code §904(1) or (2) (DWLS or allowing someone to drive with a suspended/revoked license). This sanction is subject to two exceptions:

- For a first violation, the vehicle was stolen or used with the permission of a person who did not knowingly permit an unlicensed driver to operate the vehicle.
- For a violation occurring after a prior conviction, the vehicle was stolen.

See Section 4.1 on offenses under Vehicle Code §904(1) or (2).

B. Vehicles Subject to Plate Confiscation Requirements

Under §904c, the registration plate is confiscated from the offending vehicle whether or not the vehicle is registered to its driver.* However, the following vehicles are exempt from registration plate confiscation under §904c:

- Vehicles with out-of-state registration plates.
- Tribal vehicles.
- Vehicles with international registration plates.
- Rented vehicles. Because MCL 257.37(a); MSA 9.1837(a) defines a vehicle's "owner" as someone having exclusive use of a vehicle for more than 30 days, the exception for rented vehicles applies only to rental agreements for 30 days or less.
- In the case of double-plated vehicles, only the motorized vehicle's registration plate is removed; trailer plates will not be confiscated.

Note: An officer who detains the driver of a vehicle exempt from plate confiscation will still cite the driver for the appropriate violation.

*This encourages the driver to appear in court to adjudicate the matter so the vehicle owner can obtain a new metal registration plate.

C. Operating a Vehicle with a Temporary Registration Plate

Under MCL 257.904c(2); MSA 9.2604(3)(2), the temporary registration plate remains valid until:

- The charges against the person are dismissed;
- The person pleads guilty or nolo contendere to the charges; or,
- The person is found guilty of or is acquitted of the charges.

The Secretary of State will not issue a registration for a vehicle with a temporary registration plate until the violation resulting in the issuance of the temporary plate is adjudicated or the vehicle is transferred to a person subject to payment of use tax. MCL 257.219(3); MSA 9.1919(3).

A temporary registration plate will also become invalid if the underlying registration expires before any of the above events take place. In this case, the temporary plate may be renewed at a Secretary of State branch office.

The following restrictions apply to vehicles with temporary registration plates affixed pursuant to §904c:

- Only a licensed and sober driver may drive the vehicle.
- The vehicle owner may purchase and register another vehicle under his or her name. The owner may not, however, transfer the temporary registration plate to the other vehicle.
- The vehicle may be sold, but not to anyone exempt from use tax under MCL 205.93; MSA 7.555(3)(3). MCL 257.904e(2); MSA 9.2604(5)(2). Transfers exempt from use tax under MCL 205.93(3); MSA 7.555(3)(3) occur when:
 - The transferee or purchaser has one of the following relationships to the transferor: spouse, mother, father, brother, sister, child, stepparent, stepchild, stepbrother, stepsister, grandparent, grandchild, legal ward, or a legally appointed guardian with a certified letter of guardianship.
 - The transfer is a gift to a beneficiary in the administration of an estate.
 - The vehicle has once been subjected to Michigan sales or use tax and is transferred in connection with the organization, reorganization, dissolution, or partial liquidation of an incorporated or unincorporated business and the beneficial ownership is not changed.
 - An insurance company licensed to conduct business in this state acquires ownership of a late model distressed vehicle as defined in MCL 257.12a; MSA 9.1812(1), through payment of damages in response to a claim or when the person who owned the vehicle before the insurance company reacquires ownership from the company as part of the settlement of a claim.

2.6 Arraignment/Pretrial Procedures

This section addresses pretrial proceedings that are unique to criminal cases arising under Vehicle Code §625 and §904. For a more complete discussion of pretrial proceedings in criminal cases generally, see Michigan Judicial Institute, *Misdemeanor Arraignments & Pleas* and *Felony Arraignments in District Court* (Criminal Benchbook Series, Monographs 3 and 4, 1992). For general information about magistrates' duties in traffic cases, see Michigan Judicial Institute, *New Magistrate Traffic Adjudication Manual* (1996).

A. District Court Magistrate's Authority to Act in Cases Arising Under the Vehicle Code

MCR 6.615(C) provides that an arraignment in a misdemeanor traffic case may be conducted by a district court judge or a magistrate acting as authorized by statute and by the judges of the district. In no event may a magistrate's authority exceed that conferred by his or her district judge. MCR 4.401(B).

Magistrates have statutory authority to carry out the following pretrial functions in criminal cases generally:

- Conduct a first appearance in all cases, and accept written demand or waiver of preliminary exam, and demand or waiver of jury trial. MCL 600.8513(1); MSA 27A.8513(1).
- Fix bail and accept bond in all cases. MCL 600.8511(e); MSA 27A.8511(e).
- Approve and grant petitions for the appointment of counsel for indigent defendants accused of any misdemeanor punishable by imprisonment for not more than one year, or an ordinance violation punishable by imprisonment. MCL 600.8513(2); MSA 27A.8513(2).
- Accept a plea of guilty or no contest, and impose sentence for any misdemeanor or ordinance violation punishable by a fine only and not imprisonment by the terms of the statute creating the offense. MCL 600.8512a(b); MSA 27A.8512a(b).

In cases involving Vehicle Code violations, magistrates may arraign defendants, accept guilty and no contest pleas, and impose sentence where the maximum punishment does not exceed 93 days in jail and/or a fine. *However*, this authority *does not extend* to cases involving a violation of MCL 257.625; MSA 9.2325, MCL 257.625m; MSA 9.2325(13), or a substantially corresponding local ordinance. For these drunk driving offenses, the magistrate has limited jurisdiction to arraign the defendant and set bond. MCL 600.8511(b); MSA 27A.8511(b).

B. Holding or Releasing a Defendant Prior to Arraignment

MCL 780.581–.582; MSA 28.872(1)–(2) contain interim bond provisions for defendants arrested with or without a warrant for misdemeanor or ordinance violations punishable by imprisonment for not more than one year and/or a fine. These statutes require the arresting officer to take the defendant without unnecessary delay to the most convenient magistrate of the county where the offense was committed to answer the complaint. If a magistrate is not available or immediate trial cannot be had, the person arrested may be released upon payment of an interim bond to the arresting officer or to the deputy in charge of the county jail. The amount of the bond shall neither exceed the maximum possible fine nor be less than 20% of the minimum possible fine for the offense for which the defendant was arrested. MCL 780.581(2); MSA 28.872(1)(2).

If the defendant is under the influence of alcohol and/or a controlled substance, the arresting officer may hold the defendant in a holding cell or lockup until he or she is in a proper condition to be released, or until the next session of court. MCL 780.581(3)–(4); MSA 28.872(1)(3)–(4).

Note: The Michigan Attorney General has opined that the provisions of MCL 780.581(3); MSA 28.872(1)(3) apply to a person under 21 years of age arrested for violating Vehicle Code §625(6) (zero tolerance violation). OAG No. 6824, December 1, 1994.

MCL 257.727; MSA 9.2427 similarly provides that if a person is arrested without a warrant for certain drunk driving offenses, the arresting officer shall, without unreasonable delay, take the person before the nearest or most accessible magistrate within the judicial district where the alleged offense occurred, as provided MCL 764.13; MSA 28.872. The arresting officer shall present to the magistrate a complaint stating the charges. These requirements apply to the following drunk driving offenses:*

- OUIL/OUID/UBAC under Vehicle Code §625(1).
- OWI under Vehicle Code §625(3).
- OUIL/OUID/UBAC/OWI causing death or serious impairment of a body function under Vehicle Code §625(4)–(5).
- Zero tolerance violations under Vehicle Code §625(6).
- Child endangerment under Vehicle Code §625(7).
- Violation of a local ordinance substantially corresponding to Vehicle Code §625(1), (3), or (6).

An exception to the requirements of MCL 764.13; MSA 28.872 exists in cases where the person is arrested without a warrant for a misdemeanor or ordinance violation punishable by a maximum 93 day term of imprisonment and/or a fine. In these cases, MCL 764.9c(1); MSA 28.868(3)(1) permits the arresting officer to issue the person an appearance ticket and release him or her from custody,

*In addition to the listed drunk driving offenses, the statutes' requirements apply to persons arrested for negligent homicide or reckless driving, and to persons who do not have immediate possession of a driver's license.

instead of taking the person before a magistrate and filing a complaint as provided in MCL 764.13; MSA 28.872.

C. Time Requirements for Processing Misdemeanor Drunk Driving Cases

MCL 257.625b(1)–(3); MSA 9.2325(2)(1)–(3) sets forth time limits for arraignments, pretrial conferences, and final adjudications in cases involving the following misdemeanor drunk driving offenses:

- OUIL/OUID/UBAC under Vehicle Code §625(1).
- OWI under Vehicle Code §625(3).
- Zero tolerance violations under Vehicle Code §625(6).
- Child endangerment under Vehicle Code §625(7).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under Vehicle Code §625m.
- Violations of a local ordinance substantially corresponding to Vehicle Code §625(1), (3), (6), or §625m.

The time limits set forth in §625b(1)–(3) do *not* apply to the foregoing offenses when they are joined with a felony charge. The §625b(1)–(3) time limits are also inapplicable to the following *felony* offenses:

- OUIL/OUID/UBAC under Vehicle Code §625(1).
- OWI under Vehicle Code §625(3).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under Vehicle Code §625m.

The §625b(1)–(3) time limits are as follows:

Arraignment: MCL 257.625b(1); MSA 9.2325(2)(1) requires that the defendant be arraigned not more than 14 days after the arrest for the violation, or if an arrest warrant is issued or re-issued, not more than 14 days after the issued or re-issued arrest warrant is served, whichever is later.

Pretrial conference: MCL 257.625b(2); MSA 9.2325(2)(2) requires the court to schedule a pretrial conference between the prosecutor, the defendant, and the defendant’s attorney. The court shall order the defendant to attend the conference, and may accept a plea by the defendant at its conclusion. The pretrial conference shall be held not more than 35 days after the person’s arrest for the violation, or, if an arrest warrant is issued or re-issued, not more than 35 days after the issued or re-issued arrest warrant is served, whichever is later. The statute extends this period to 42 days if the court only has one judge who sits in multiple locations in the district. The conference may be adjourned upon the motion of a party for good cause shown. Not more than one adjournment shall be granted a party, and the length of an adjournment shall not exceed 14 days.

Final adjudication: MCL 257.625b(3); MSA 9.2325(2)(3) requires the court to finally adjudicate the above-referenced misdemeanor drunk driving offenses within 77 days after the defendant is arrested for the violation, or, if an arrest warrant is issued or re-issued, not more than 77 days after the date the issued or re-issued arrest warrant is served, whichever is later. This time limitation does not apply if a delay is attributable to:

- The unavailability of the defendant or a witness;
- The unavailability of material evidence;
- An interlocutory appeal; or,
- Exceptional circumstances.

The §625b(3) time limit is not excused by delays attributable to docket congestion. A final adjudication may be by a plea of guilty or no contest, by entry of a verdict, or by other final disposition.

Failure to comply with the §625b(1)–(3) time limits shall not result in dismissal of the case or imposition of any other sanction.

D. Charging Documents

Offenses carrying a maximum 93 day term of imprisonment and/or a fine may be charged using a traffic citation. Other offenses, however, must be processed on a complaint and warrant. See MCL 257.727c(3), 764.1e; MSA 9.2427(3)(3), 28.860(5), and MCR 6.615(A).

In charging repeat offenders, prosecuting attorneys must include a statement listing the defendant's prior convictions on the complaint and information whenever they seek the following criminal penalties or vehicle sanctions under the Vehicle Code:

- Enhanced sentences for repeat drunk driving offenders under §625. MCL 257.625(14); MSA 9.2325(14).
- Enhanced sentences for repeat offenders driving with a suspended or revoked license under §904. MCL 257.904(8); MSA 9.2604(8).
- Vehicle immobilization for drunk driving or DWLS offenses under §904d. MCL 257.625(14); MSA 9.2325(14) and MCL 257.904(8); MSA 9.2604(8).
- Vehicle forfeiture for specified drunk driving offenses under §625n. MCL 257.625(14); MSA 9.2325(14).

Prior to a person's arraignment before a district court magistrate or judge on a charge of violating MCL 257.904; MSA 9.2604, subsection (14) of that statute provides that the arresting officer shall obtain the person's driving record from the Secretary of State and shall furnish the record to the court. (The driving

record may be obtained from the Secretary of State's computer information network.)

E. Guilty and Nolo Contendere Pleas

The following discussion addresses issues that commonly arise in taking guilty and nolo contendere pleas in drunk driving cases. For detailed information on plea-taking generally, see Michigan Judicial Institute, *Misdemeanor Arraignments & Pleas* and *Felony Arraignments in District Court* (Criminal Benchbook Series, Monographs 3 and 4, 1992)

1. Prerequisites for Accepting a Plea — Advice to the Defendant

In general, the requirements for accepting a guilty or nolo contendere plea are contained in MCR 6.302 (cases cognizable in circuit court) and MCR 6.610(E) (cases cognizable in district court). Under these rules, the court must be convinced that the defendant's plea is understanding, voluntary, and accurate. The defendant must also be informed of his or her due process rights and of the consequences of the plea.

For guilty or nolo contendere pleas arising under Vehicle Code §625 or a local ordinance substantially corresponding to Vehicle Code §625(1), (2), (3), or (6), MCL 257.625b(4); MSA 9.2325(2)(4) also provides that the court must advise the accused of the maximum possible term of imprisonment and the maximum possible fine that may be imposed for the violation.* Furthermore, the court must advise the defendant that the maximum possible license sanction that may be imposed will be based upon the defendant's master driving record maintained by the Secretary of State. Section 625b(4) does not require the court to inform the defendant of the specific licensing sanctions that apply to the violation in question; however, the Advisory Committee for this chapter of the Benchbook recommends that courts do so as a best practice prior to accepting a guilty plea to a violation of §625.

*MCR 6.610(E)(3)(a) and 6.302(B)(2) contain a similar requirement.

People v Asquini, 227 Mich App 702 (1998) is instructive with regard to the manner in which a court informs a defendant of the right to appointed counsel before accepting a guilty plea. In taking the two OUIL pleas at issue in that case, the trial court was deemed to have obtained the defendant's intelligent waiver of the right to counsel by eliciting his affirmative response to the question: "[Do you understand] you're waiving the right to have an attorney appointed for you if you can't afford one?" While holding that this question adequately informed this college-educated defendant of the right to court-appointed counsel, the Court of Appeals noted that "[w]e do regard the district court's manner of informing defendant of his right to counsel as less than ideal. We need not express an opinion regarding whether the district court's questioning would have provided the requisite information to allow a defendant of less than average intellectual ability to waive intelligently the right to counsel." To resolve possible ambiguities regarding a defendant's waiver of the right to counsel, the Court of Appeals recommended that a

*MCR 6.610(D)(3) allows waiver of an attorney by “a writing that is made a part of the file or orally on the record.”

written advice-of-rights form* signed by the defendant could be marked as an exhibit and made part of the record. 227 Mich App at 712, n 4.

2. Use of Uncounselled Conviction to Enhance Subsequent Charge or Sentence

MCR 6.610(E) sets forth requirements a court must meet before accepting a plea of guilty or no contest. With respect to the right to counsel, this rule provides as follows:

“(2) The court shall inform the defendant of the right to the assistance of an attorney. If

(a) the offense charged is punishable by more than 93 days in jail,

(b) the offense charged requires a minimum jail sentence, or

(c) the court makes a determination that it may send the defendant to jail,

the court shall inform the defendant that if the defendant is indigent he or she has the right to an appointed attorney. *A subsequent charge or sentence may not be enhanced because of this conviction unless a defendant is represented by an attorney or he or she waives the right to an appointed attorney.* [Emphasis added.]

The Michigan Supreme Court has held that the emphasized language quoted above applies only to cases in which the defendant has a right to appointed counsel. In misdemeanor cases, the right to appointed counsel exists only if *actual imprisonment* is imposed, irrespective of whether the conviction is obtained by trial or plea. *People v Reichenbach*, 459 Mich 109, 125–126 (1998). Thus, a plea-based misdemeanor conviction obtained without the advice of counsel or the waiver of the right to counsel can be used to enhance subsequent charges, as long as no actual imprisonment was imposed for it.

Note: A conditional sentence under which a defendant might be imprisoned for failing to meet a condition does not constitute “actual imprisonment.” *People v Reichenbach, supra*, 459 Mich at 121.

3. Collateral Attack of Guilty Plea to Prior Offense

A “collateral attack” is a constitutional challenge to a plea raised other than by initial appeal of the conviction in question. *People v Ingram*, 439 Mich 288, 291, n 1 (1992). A conviction found constitutionally infirm on collateral attack may not be used for purposes of sentence enhancement. See *Matheson v Secretary of State*, 170 Mich App 216, 220 (1988).

The validity of a guilty plea may only be collaterally attacked if the plea was taken in violation of the defendant's right to counsel. Thus, a plea may not be collaterally attacked if the defendant: 1) was represented by an attorney when the plea was entered; or, 2) intelligently waived the right to counsel, including the right to court-appointed counsel. Where the foregoing requirements are met, the failure of the plea-taking court to adhere to applicable plea-taking requirements does not support a defendant's challenge to the plea by collateral attack. *People v Ingram, supra*, 439 Mich at 293–295.

The foregoing principles were applied in *People v Asquini*, 227 Mich App 702 (1998), where the defendant sought to quash charges of OUIL-3d by asserting that his two prior OUIL convictions were constitutionally infirm. Defendant asserted that when he pled guilty to the two prior offenses, he had not been represented by counsel, had not been properly advised of the right to counsel, and had not knowingly and intelligently waived his right to counsel. The Court of Appeals disagreed, holding that both prior convictions could be used as the basis for the OUIL-3d charge. Citing *People v Ingram, supra*, the Court noted that the *Asquini* defendant had intelligently waived his right to counsel in both prior proceedings, so that the prior pleas were not subject to collateral attack. 227 Mich App at 717.

The Michigan Supreme Court has held that a long-delayed direct appeal from a plea-based conviction of OUIL-2d will be deemed collateral and subjected to the restrictions on attack articulated in *People v Ingram, supra*. *People v Ward*, 459 Mich 602 (1999). In *People v Ward*, the defendant moved to set aside a guilty plea to OUIL-2d fourteen months after it was entered in district court. This motion was brought only after the defendant had been charged with OUIL-3d, and was intended to extricate the defendant from the sentence enhancements that would result from the prior conviction. At the plea-taking on the OUIL-2d charge, the district judge had accepted defendant's plea without observing the requirements of MCR 6.610(E). Specifically, the judge failed to question the defendant to determine whether the plea was understanding, voluntary, and accurate. The judge also failed to inform the defendant of the maximum sentence or of the rights he gave up by offering the plea. The prosecutor was not present at the plea-taking, and defendant's retained counsel did not bring the procedural defects to the court's attention, thus preserving the possibility of setting aside the plea if the defendant were ever charged with another OUIL offense. The Supreme Court deemed the defendant's long-delayed motion a "collateral attack," and held that "because the validity of the plea was contested merely out of subsequent sentencing concerns, defendant's ability to directly attack his OUIL 2d conviction was foreclosed when he was arrested and charged with OUIL 3d." 459 Mich at ____.

Note: The difficulties in *Ward* resulted from the lack of time limits for bringing a motion to withdraw a plea in district court and filing an appeal from a denial of such a motion pursuant to MCR 6.610(E)(7) and MCR 7.103(B). To address these difficulties, the Supreme Court has published for comment proposed amendments to MCR 6.610(E)(7)(a) and 7.103(B)(6) to clarify the time limits for challenging plea-based convictions in district

court. The proposed amendments would impose a 12 month time limit on the post-judgment filing of motions to withdraw pleas and appeals concerning such motions. See 78 Mich B J 753 (July, 1999).

4. Effect of Constitutional Infirmary on Licensing Sanction

The Court of Appeals has held that a constitutionally infirm OUIL conviction that has not been appealed or vacated may be used to form the basis of an administrative action revoking a person's driving privileges. *Broadwell v Department of State*, 213 Mich App 306, 308–309 (1995), *Matheson v Secretary of State*, 170 Mich App, 216, 221 (1988). The Court in *Matheson* reasoned that “the revocation or suspension of a person's driving privileges by the Secretary of State is not enhancement of a punishment against the person, but rather is an administrative action aimed at the protection of the public.” 170 Mich App at 220–221.

5. Effect of Nolo Contendere Pleas in Subsequent Actions

A conviction based on a plea of nolo contendere may be used to enhance a subsequent charge. MCL 257.910; MSA 9.2619 provides:

“A conviction based on a plea of nolo contendere shall be treated in the same manner as a conviction based on a plea of guilty.”

See also MCL 257.8a; MSA 9.1808(1), which defines “conviction” to include a plea of nolo contendere.

6. Limitations on the Use of Evidence of a Plea in Subsequent Actions

A plea-based conviction used to enhance a subsequent charge should be distinguished from evidence of the plea itself. Use of evidence of the plea is limited by MRE 410, which provides:

“Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;

(3) Any statement made in the course of any proceedings under MCR 6.302* or comparable state or federal procedure regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

“However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.”

7. Restrictions on Plea Bargains Involving the Zero Tolerance Provisions of the Vehicle Code

The Vehicle Code contains the following restrictions on plea bargains involving the zero tolerance provisions of MCL 257.625(6); MSA 9.2325(6):

• Plea to Zero Tolerance Violation Prohibited

Under MCL 257.625(15); MSA 9.2325(15), persons charged with any of the following violations may not enter a plea of guilty or nolo contendere to a charge of violating Vehicle Code §625(6) (governing zero tolerance violations) in exchange for dismissal of the original charge:

- OUIL/UUID/UBAC under §625(1).
- OWI under §625(3).
- OUIL/UUID/UBAC/OWI causing death under §625(4).
- OUIL/UUID/UBAC/OWI causing serious impairment of a body function under §625(5).
- Child endangerment under §625(7).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content, under §625m.

MCL 257.625(15); MSA 9.2325(15) does not prohibit the court from dismissing the charge upon the prosecutor’s motion.

• Restrictions for Defendants Charged with Zero Tolerance Violation

A court shall not accept a plea of guilty or nolo contendere for a violation of MCL 257.624a; MSA 9.2324(1) (governing transporting or possessing alcohol in an open container) from a person charged solely with a zero tolerance violation under Vehicle Code §625(6).

*MCR 6.302 governs pleas of guilty and nolo contendere in criminal cases cognizable in circuit court.

F. Discovery

A trial court may grant a motion for discovery on two different grounds. First, MCR 6.201 makes certain discovery mandatory in felony cases. Second, in a criminal case, the trial court has the discretion to grant additional discovery. *People v Valeck*, 223 Mich App 48, 50 (1997).

1. Mandatory Discovery

MCR 6.201(A) requires a party to provide the following information to all other parties upon request:

“(1) the names and addresses of all lay and expert witnesses whom the party intends to call at trial;

“(2) any written or recorded statement by a lay witness whom the party intends to call at trial, except that a defendant is not obliged to provide the defendant’s own statement;

“(3) any report of any kind produced by or for an expert witness whom the party intends to call at trial;

“(4) any criminal record that the party intends to use at trial to impeach a witness;

“(5) any document, photograph, or other paper that the party intends to introduce at trial; and

“(6) a description of and an opportunity to inspect any tangible physical evidence that the party intends to introduce at trial. On good cause shown, the court may order that a party be given the opportunity to test without destruction such tangible physical evidence.”

In *People v Valeck*, *supra*, the defendant sought to inspect a Datamaster breath test instrument that police had used to test his blood alcohol level. The Court of Appeals held that MCR 6.201(A)(6) (compelling inspection of “any tangible physical evidence that [a] party intends to introduce at trial”) did not entitle the defendant to inspect the Datamaster: “The instrument itself is not ‘tangible physical evidence’ within the plain meaning of that term. The physical evidence here was the defendant’s breath, not the instrument used to test it.” 223 Mich App at 51.

MCR 6.201(B) requires the prosecution to provide the following information to each defendant upon request:

“(1) any exculpatory information or evidence known to the prosecuting attorney;

“(2) any police report concerning the case, except so much of a report as concerns a continuing investigation;

“(3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial;

“(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

“(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.”

There is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by the defendant’s right against self-incrimination. MCR 6.201(C)(1). However, records subject to privilege may be subject to discovery after an in-camera inspection of the records, upon a demonstration of the defendant’s good faith belief, grounded in articulable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense. MCR 6.201(C)(2). For more discussion about pretrial discovery of privileged records in felony cases, see Lovik, *Domestic Violence: A Guide to Civil and Criminal Proceedings*, §5.8(H) (MJJI, 1998).

2. Discovery in the Court’s Discretion

The Michigan Supreme Court has “long entrusted the question of discovery in criminal cases to the discretion of the trial court.” *People v Lemcool*, 445 Mich 491, 497 (1994). In reviewing a trial court’s discovery order for an abuse of discretion, the Court of Appeals has inquired whether the order furthers the purposes of discovery, which the Court of Appeals has articulated as follows:

“The purpose of broad discovery is to promote the fullest possible presentations of the facts, minimize opportunities for falsification of evidence, and eliminate vestiges of trial by combat....[D]isclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.” *People v Valeck*, 223 Mich App 48, 51–52 (1997), citing *People v Wimberly*, 384 Mich 62, 66 (1970).

In *People v Valeck*, *supra*, the defendant moved to inspect a Datamaster breath test instrument that police had used to test his blood alcohol level. The defendant sought such discovery to support his challenge to the reliability of Datamaster breath test instruments generally. The Court of Appeals held that the trial court’s order granting the defendant’s motion had been an abuse of discretion because it did not further the purposes of discovery. The panel reasoned that the defendant had already contacted an expert familiar with the instrument, and so did not need to inspect the particular instrument used in his case to gain access to the information he needed to support his challenge. 223 Mich App at 52.

2.7 Procedural Issues Arising at Trial

The following discussion addresses procedural issues that arise in the trial of certain offenses arising under Vehicle Code §625. See also Section 2.6(C) for a discussion of the 77 day time limit for final adjudication of specified misdemeanor drunk driving offenses.

A. No Right to Jury Trial on Prior Convictions Under §625

In repeat drunk driving cases, a prior conviction shall be established at sentencing by one or more of the following:

- An abstract of conviction.
- A copy of the defendant's driving record.
- An admission by the defendant.

MCL 257.625(16); MSA 9.2325(16). A jury has no role in determining whether the defendant has been convicted of prior drunk driving offenses. *People v Weatherholt*, 214 Mich App 507, 512 (1995).

B. Findings and Reporting Requirements in Cases Involving Driving While Under the Influence of a Controlled Substance

Special findings are required in OUIL/OUID and OWI cases arising under Vehicle Code §625(1) and (3) (or a substantially corresponding local ordinance), if the defendant is charged with operating a vehicle while under the influence of a controlled substance or a combination of intoxicating liquor and a controlled substance. The requirement for special findings can be met by a special jury verdict or a finding by the jury.

Under MCL 257.625(17)–(18); MSA 9.2325(17)–(18), the court shall require the jury to return a special verdict in the form of a written finding as to whether the defendant was under the influence of a controlled substance or a combination of intoxicating liquor and a controlled substance. If the court convicts the person without a jury or accepts a plea of guilty or nolo contendere, the court shall make a finding as to whether the person was under the influence of a controlled substance or a combination of intoxicating liquor and a controlled substance.

Alternatively, a jury may be instructed to make a finding solely as to either of the following:

- Whether the defendant was under the influence of a controlled substance or a combination of intoxicating liquor and a controlled substance at the time of the violation; or,
- Whether the defendant was visibly impaired due to his or her consumption of a controlled substance or a combination of

intoxicating liquor and a controlled substance at the time of the violation. MCL 257.625(19); MSA 9.2325(19).

If the jury or court finds that the defendant operated a motor vehicle under the influence of or while impaired due to the consumption of a controlled substance or a combination of intoxicating liquor and a controlled substance, MCL 257.625(20); MSA 9.2325(20) requires the court to do both of the following:

- Report the finding to the Secretary of State; and,
- Forward to the Department of State Police a record that specifies the penalties imposed by the court, including any prison term and any sanction imposed under §625n (on vehicle forfeiture) or §904d (on vehicle immobilization). Forms for this purpose are prescribed by the State Court Administrator.

The records forwarded to the Department of State Police are public record and must be retained for not less than seven years. MCL 257.625(21); MSA 9.2325(21).

2.8 Evidentiary Questions — Chemical Tests

This section discusses various questions that arise in drunk driving cases with respect to the admission of chemical tests into evidence at trial.

A. Admissibility of Preliminary Chemical Breath Analysis Results

The results of a preliminary chemical breath analysis* administered pursuant to MCL 257.625a(2); MSA 9.2325(1)(2) are admissible for certain purposes in an administrative hearing, or in a criminal prosecution for one of the following crimes listed in Vehicle Code §625c(1):

- OUIL/OUID/UBAC under §625(1).
- OWI under §625(3).
- OUIL/OUID/UBAC/OWI causing death or serious impairment of a body function under §625(4) or (5).
- Zero tolerance violations under §625(6).
- Child endangerment under §625(7).
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Violation of a local ordinance substantially corresponding to §625(1), (3), or (6), §625a(5) or §625m.

*Section 2.1(B) addresses the circumstances where police may require a preliminary chemical breath analysis.

*See Section 1.3 on proposed amendments to §625a(2) during the 1999 legislative session. These amendments would broaden the admissibility of preliminary chemical breath test results into evidence at trial.

- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, *if* the police had reasonable grounds to believe the driver was operating the vehicle: 1) while impaired by or under the influence of alcohol and/or a controlled substance; 2) with an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine; or, 3) in violation of the zero tolerance provisions of §625(6).

The purposes for which the results of the preliminary chemical breath analysis are admissible are listed in MCL 257.625a(2)(b); MSA 9.2325(1)(2)(b) as follows:*

- To assist the court or hearing officer in determining a challenge to the validity of an arrest.
- As evidence of the defendant's breath alcohol content, if offered by the defendant to rebut testimony elicited on cross-examination of a defense witness that the defendant's breath alcohol content was higher at the time of the charged offense than when a chemical test was administered pursuant to the implied consent statute (Vehicle Code §625c).
- As evidence of the defendant's breath alcohol content, if offered by the prosecutor to rebut testimony elicited on cross-examination of a prosecution witness that the defendant's breath alcohol content was lower at the time of the charged offense than when a chemical test was administered pursuant to the implied consent statute (Vehicle Code §625c).

B. Admissibility of Chemical Tests Taken Under the Implied Consent Statute

*See Section 2.3 on chemical tests under the implied consent statute.

The results of a chemical test done pursuant to the Vehicle Code's implied consent statute are admissible into evidence in any civil or criminal proceeding. MCL 257.625a(6)(a); MSA 9.2325(1)(6)(a).* If the person subject to testing under the implied consent statute chooses to undergo a test administered by someone of his or her own choosing, the results of this independent test are likewise admissible and shall be considered with other admissible evidence in determining the defendant's guilt or innocence. MCL 257.625a(6)(d); MSA 9.2325(1)(6)(d).

The foregoing provisions for the admissibility of chemical test results do not limit the introduction of any other admissible evidence bearing upon the question whether a person was driving in violation of the OUIL/OUID/UBAC, OWI, or zero tolerance provisions in Vehicle Code §625(1), (3), or (6). MCL 257.625a(7); MSA 9.2325(1)(7).

If a chemical test described in §625a(6) is administered, the test results shall be made available to the defendant or his or her attorney upon written request to the prosecutor, with a copy of the request filed with the court. The prosecutor

shall furnish the results at least two days before the date of the trial. The prosecutor shall offer the test results as evidence in the trial. Failure of the prosecutor to fully comply with the request bars the admission of the results into evidence by the prosecution. MCL 257.625a(8); MSA 9.2325(1)(8).

C. Blood Tests Taken for Medical Treatment After an Accident

MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e) provides that if a driver is transported to a medical facility after an accident and a blood sample is withdrawn for medical treatment, the results of a chemical analysis are admissible in any civil or criminal proceeding to show the amount of alcohol and/or presence of a controlled substance in the person's blood at the time of the accident, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecutor who requests them for use in a criminal prosecution. The Michigan Supreme Court has held that MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e) renders the results of blood tests admissible at trial irrespective of whether the physician-patient privilege was waived or a valid search warrant was obtained. *People v Keskimaki*, 446 Mich 240, 247 (1994).

If a driver is deceased after an accident, a blood sample shall be withdrawn in a manner directed by the medical examiner to determine the amount of alcohol and/or presence of a controlled substance. The medical examiner shall give the results of the chemical analysis to the law enforcement agency investigating the accident; that agency shall forward the results to the Department of State Police. MCL 257.625a(6)(f); MSA 9.2325(1)(6)(f).

Note: The nature of an “accident” was considered by the Michigan Supreme Court in *People v Keskimaki*, *supra*. See Section 2.4(B)(1).

D. Evidentiary Effect of Defendant's Refusal to Submit to a Chemical Test

A person's refusal to submit to a chemical test under the implied consent provisions of the Vehicle Code is admissible in a criminal prosecution for a crime described in §625c(1) only to show that a test was offered to the defendant, but not as evidence in determining the defendant's guilt or innocence. The jury shall be instructed accordingly. MCL 257.625a(10); MSA 9.2325(1)(10).*

A jury instruction on the defendant's decision to forgo chemical testing appears at CJI2d 15.9.

Note: The crimes described in §625c(1) are:

- OUIL/OUID/UBAC under §625(1).
- OWI under §625(3).

*See Section 1.3 on proposed amendments to §625a(10) during the 1999 legislative session. These amendments would broaden the admissibility of a person's refusal to submit to a chemical test under the implied consent statute.

- OUIL/OUID/UBAC/OWI causing death or serious impairment of a body function under §625(4) or (5).
- Zero tolerance violations under §625(6).
- Child endangerment under §625(7).
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Violation of a local ordinance substantially corresponding to §625(1), (3), or (6), §625a(5) or §625m.
- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, *if* the police had reasonable grounds to believe the driver was operating the vehicle: 1) while impaired by or under the influence of alcohol and/or a controlled substance; 2) with an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine; or, 3) in violation of the zero tolerance provisions of §625(6).

E. Presumptions Arising from Results of Chemical Tests

Except in a prosecution relating solely to a violation of Vehicle Code §625(1)(b) (UBAC) or §625(6) (zero tolerance), the amount of alcohol in the driver's blood, breath, or urine as shown by a chemical analysis gives rise to the following presumptions under MCL 257.625a(9); MSA 9.2325(1)(9):

- The defendant is presumed to be NOT impaired or NOT under the influence if there were 0.07 grams or less of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- The defendant is presumed to be impaired for purposes of Vehicle Code §625(3) if there were more than 0.07 grams but less than 0.10 grams of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- The defendant is presumed to be under the influence if there were 0.10 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

F. Foundational Requirements for Admission of Chemical Tests

For the results of chemical tests of blood alcohol to be admitted into evidence, they must meet the threshold relevancy requirements of MRE 401–403. Applying these rules in the context of an OUIL case, the Court of Appeals has noted that chemical test results are admissible if: 1) they have a tendency to show that a defendant was more probably or less probably impaired or intoxicated when driving; and, 2) the probative value of the evidence is not

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *People v Campbell*, ___ Mich App ___ (No 212907, July 2, 1999).

In *People v Wager*, ___ Mich ___ (No 113712, June 15, 1999), the Michigan Supreme Court overruled holdings in previous Court of Appeals cases that had conditioned the admissibility of chemical test results on a showing by the prosecutor that the test was performed within a reasonable time after the arrest.* In *Wager* and in *Campbell, supra*, both Michigan appellate courts held that the passage of time between the arrest and the test goes to the weight, not the admissibility of the test results.

The *Campbell* and *Wager* decisions did not address three other foundational requirements that had been previously articulated by the Court of Appeals as prerequisites for the admission of the results of chemical tests. These requirements are:

- The operator administering the test was qualified.
- The proper method or procedure was followed in administering the test.
- The testing device was reliable.

See, e.g., *People v Jacobsen*, 205 Mich App 302, 305 (1994), rev'd on other grounds 448 Mich 639 (1995), and *People v Kozar*, 54 Mich App 503, 509, n 2 (1974). Presumably, these three requirements continue to apply; the Supreme Court in *Wager* overruled *Kozar*, *Jacobsen* and other similar cases only "to the extent that [they] adopt a 'reasonable time' element."

The propriety of test administration procedures was challenged by the defendant in *People v Wujkowski*, 230 Mich App 181 (1998). In this case the defendant was arrested for suspected drunk driving and transported to the county jail for a Breathalyzer test. In response to OUIL charges, he moved to suppress the test results, asserting that the officer performing the test failed to observe him for 15 continuous minutes as required by 1994 AACPS, R 325.2655(1)(e).* Prior to administering the test, the officer had continually observed the defendant for 15 minutes, except for approximately six seconds when the officer walked away to check the amount of time elapsed. During those six seconds, another officer was with the defendant. There were no allegations that the defendant placed anything in his mouth or regurgitated. The district court denied the defendant's motion to suppress the test results, finding that the officer's momentary loss of view of the defendant was not significant when viewed in the totality of the circumstances. The Court of Appeals agreed with the district court, holding that the six second lapse was "so minimal that the test results cannot be assumed to be inaccurate." 230 Mich App at 186. The panel further noted that exclusion of evidence is not necessarily the appropriate remedy for every violation of an administrative rule; suppression is an

*These cases include *People v Jacobsen*, 205 Mich App 302 (1994), rev'd on other grounds 448 Mich 639 (1995), *People v Kozar*, 54 Mich App 503 (1974), *People v Krulikowski*, 60 Mich App 28 (1975), *People v Schwab*, 173 Mich App 101 (1988), and *People v Prelesnik*, 219 Mich App 173 (1996).

*This rule prevents test takers from smoking, regurgitating, or placing anything in their mouths except for the mouthpiece.

appropriate remedy only when an egregious deviation from the rule leads to questionable accuracy of the test results. 230 Mich App at 186–187.

For a case in which deviation from 1994 AACCS, R 325.2655(1)(e) required suppression of Breathalyzer test results, see *People v Boughner*, 209 Mich App 397, 399–400 (1995), in which the Breathalyzer operator observed the defendant for less than eight minutes, and throughout the 35 minutes before the test was administered, a videotape showed that the defendant’s hand was either at his face or mouth.

2.9 General Sentencing Considerations for §625 and §904 Offenses

This section addresses general principles and statutory provisions that apply whenever the court imposes criminal penalties for offenses arising under Vehicle Code §625 and §904. The criminal penalties for specific offenses are listed in the discussion of each offense that appears in Chapters 3 and 4 below. A general discussion of licensing and vehicle sanctions under the 1998 amendments to the Vehicle Code is found in Sections 2.10 and 2.11, respectively.

A. Conflict Between the Code of Criminal Procedure and the Vehicle Code

A conflict between the penal provisions of the Vehicle Code and the Code of Criminal Procedure must be resolved in favor of the more specific Vehicle Code provisions. In *Wayne County Prosecutor v Wayne Circuit Judge*, 154 Mich App 216 (1986), the trial court sentenced a defendant convicted of OUIL-3d to a three year probationary term with 20 weekends to be served in jail. This sentence was authorized by the Code of Criminal Procedure, MCL 771.1(1); MSA 28.1131(1), which authorized probationary sentences for felony and misdemeanor convictions other than for first degree murder, treason, first and second degree criminal sexual conduct, armed robbery, and major controlled substance offenses. The prosecutor filed a motion for superintending control, asserting that the defendant should have been sentenced under the general penal provision of the Vehicle Code that mandated a sentence of one to five years in prison and/or a fine of not less than \$500.00 nor more than \$5,000.00. (MCL 257.902; MSA 9.2602.) The Court of Appeals vacated the sentence, holding as follows:

“Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act....The dates on which the two statutes were enacted or reenacted are irrelevant; a

later statute which is general and affirmative in its provisions will not abrogate a former one which is particular or special....Hence, even though §902 of the vehicle code has not been amended since 1949, whereas the probation statute was reenacted as recently as 1982 PA 470, nonetheless, the former controls.” 154 Mich App at 221.

Applying the foregoing principles to the case at bar, the Court of Appeals found that the trial court should have imposed a prison term and/or fine on the defendant as provided in the Vehicle Code. However, the trial court’s probationary order was not invalid; in the court’s discretion, it could supplement the probationary order with a fine of not less than \$500.00 nor more than \$5,000.00 to comply with the Vehicle Code’s general penal provision. 154 Mich App at 221–222.

B. Establishing Prior Convictions

In repeat drunk driving and DWLS cases, a prior conviction* shall be established at or before sentencing by one or more of the following:

- An abstract of conviction.
- A copy of the defendant’s driving record.
- An admission by the defendant.

*See Section 1.4(G) for a definition of “prior conviction.”

See MCL 257.625(16); MSA 9.2325(16) and MCL 257.904(9); MSA 9.2604(9).

A jury has no role in determining whether the defendant has been convicted of prior drunk driving offenses. *People v Weatherholt*, 214 Mich App 507, 512 (1995).

C. Alcohol Assessment and Counseling in Drunk Driving Cases

MCL 257.625b(5); MSA 9.2325(2)(5) contains alcohol assessment provisions for offenders who violate the following Vehicle Code provisions:

- OUIL/OUID/UBAC under §625(1) or a substantially corresponding local ordinance;
- OWI under §625(3) or a substantially corresponding local ordinance;
- OUIL/OUID/UBAC/OWI causing death under §625(4);
- OUIL/OUID/UBAC/OWI causing serious impairment of a body function under §625(5);
- Zero tolerance violations under §625(6) or a substantially corresponding local ordinance; or,
- Child endangerment under §625(7).

Before imposing sentence for one of the foregoing offenses, the court shall order both first-time and repeat offenders to undergo screening and assessment by a person or agency designated by the Office of Substance Abuse Services to determine whether they are likely to benefit from rehabilitative services, including alcohol or drug education and alcohol or drug treatment programs. The court *may* order a first-time offender to participate in and successfully complete one or more appropriate rehabilitative programs as part of the sentence. If an offender has one or more prior convictions, the court *shall* order participation in and successful completion of such a program or programs. All offenders shall pay the costs of the screening, assessment, and rehabilitative services.

D. Restitution for Costs in Drunk Driving Cases

The court may order any defendant convicted of a Vehicle Code §625 violation to pay the costs of prosecution. MCL 257.625(12); MSA 9.2325(12).

Orders to reimburse the expenses of prosecution are also authorized under MCL 769.1f; MSA 28.1073(5), for offenders who violate the following provisions:

- OUIL/OUID/UBAC under §625(1) or a substantially corresponding local ordinance;
- OWI under §625(3) or a substantially corresponding local ordinance;
- OUIL/OUID/UBAC/OWI causing death under §625(4);
- OUIL/OUID/UBAC/OWI causing serious impairment of a body function under §625(5);
- Zero tolerance violations under §625(6) or a substantially corresponding local ordinance;
- Child endangerment under §625(7); or,
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m or a substantially corresponding local ordinance.

For the above violations, MCL 769.1f; MSA 28.1073(5) further permits the court to order reimbursement to the state or a local unit of government for expenses incurred in relation to the violation. These expenses include wages of law enforcement personnel, wages of fire department and emergency medical service personnel, and costs of medical supplies used in providing services.

If the court places the defendant on probation or parole, it shall make reimbursement of expenses related to the violation a condition of probation or parole. Failure to make a good faith effort to comply with the court's order for reimbursement shall be grounds for revocation of probation or parole. MCL 769.1f(5); MSA 28.1073(5)(5).

E. Community Service in Drunk Driving Cases

Persons sentenced to perform community service for a violation of Vehicle Code §625 may not receive compensation and must reimburse the state or appropriate local unit of government for the cost of supervision incurred by the state or local unit of government as a result of the person's activities in that service. MCL 257.625(13); MSA 9.2325(13).

F. Applying the Sentencing Guidelines

Legislative sentencing guidelines were enacted by 1998 PA 317, codified at Chapter XVII of the Code of Criminal Procedure, MCL 777.1 et seq; MSA 28.--. These guidelines apply to offenses committed on or after January 1, 1999. They apply to every felony and to every misdemeanor punishable by more than one year of imprisonment, if there is judicial sentencing discretion and if the offense was enacted prior to the enactment of the guidelines.

As of September 1, 1999, amendments to the sentencing guidelines were pending before the Michigan Legislature. The following discussion will begin by describing the guidelines provisions concerning offenses under Vehicle Code §625 and §904 that were in effect on September 1, 1999. Then, the discussion will summarize pertinent amendments contained in SB 373, which was pending before the Michigan Senate on that date.

1. Guidelines Provisions as of September 1, 1999

MCL 777.11--19; MSA 28.-- contain a list of over 700 offenses to which the sentencing guidelines apply. Because the 1998 amendments to the Vehicle Code were enacted after the passage of these sentencing guidelines provisions, the guidelines do not apply to the following offenses:

- Felony child endangerment under MCL 257.625(7); MSA 9.2325(7).
- Allowing an intoxicated person to operate a vehicle, causing death or serious impairment of a body function under MCL 257.625(9); MSA 9.2325(9).
- Allowing a person to operate a vehicle with a suspended or revoked license, causing death or serious impairment of a body function under MCL 257.904(7); MSA 9.2604(7).
- Driving with a suspended or revoked license, causing death or serious impairment of a body function under MCL 257.904(4)–(5); MSA 9.2604(4)–(5).

As of September 1, 1999, the sentencing guidelines also contain no reference to the following felony penalties contained in the 1998 amendments to the Vehicle Code:

- Vehicle Code §625(10)(c) (OWI—third offense within ten years); or,

- Vehicle Code §625m(5) (operating a commercial vehicle with an unlawful bodily alcohol content—third offense within ten years).

It is unclear how the sentencing guidelines apply to felony OUIL offenses (third offense within ten years) as contemplated by the 1998 amendments to the Vehicle Code—the guidelines refer to “OUIL—Third Offense” under prior MCL 257.625(7)(d); MSA 9.2325(7)(d).

For purposes of scoring an offense to which the guidelines apply, there are 19 offense variables. The court determines which of these offense variables to score for a given offense according to the category of the offense. All offenses are categorized into the following crime groups related to the general nature of the offense:

- Crimes Against a Person.
- Crimes Against Property.
- Crimes Involving a Controlled Substance.
- Crimes Against Public Order.
- Crimes Against Public Safety.
- Crimes Against Public Trust.

In scoring offense variables, the court looks to the crime group to which the offense belongs in order to determine which of the 19 variables it should score. For example, certain offense variables are to be scored for Person offenses, while a different selection of variables is to be scored for Public Order offenses. See MCL 777.22; MSA 28.-- for a list of the offense variables that should be scored for each crime group.

Pursuant to MCL 777.12; MSA 28.--, Vehicle Code §625 offenses belong to the following Crime Groups:

- OUIL causing death under § 625(4) — Crimes Against a Person.
- OUIL causing serious impairment of a body function under §625(5) — Crimes Against a Person.
- OUIL-3d under former §625(7)(d) — Crimes Against Public Safety.
- Disposing of a vehicle to avoid forfeiture under §625n(10) — Crimes Against Public Order.

Offense Variable 18 is of particular interest in drunk driving cases, as it considers operator ability affected by alcohol or drugs. The number of points assigned to an offense under this variable increases with the percentage of bodily alcohol content.

The sentencing guidelines also identify seven prior record variables that are assigned points according to circumstances described in MCL 777.50–.57; MSA 28.--. For purposes of scoring, prior felonies are assigned a class

designation with the letters “A” — “H” according to the seriousness of the crime. When scoring prior record variables under the sentencing guidelines legislation, the following provisions are of interest in cases involving prior convictions for drunk driving offenses:

- In scoring prior record variables 1 or 3 (high severity felony convictions or juvenile adjudications in classes A — D), the court should count OUIL causing death under Vehicle Code §625(4). MCL 777.12,.51,.53; MSA 28.--.
- In scoring prior record variables 2 or 4 (low severity felony convictions or juvenile adjudications in classes E — H), the court should count OUIL-3d under prior Vehicle Codes §625(7)(d), OUIL causing serious impairment of a body function under Vehicle Code §625(5), and disposing of a vehicle to avoid forfeiture under Vehicle Code §625n(10). MCL 777.12,.52,.54; MSA 28.--.
- In scoring prior record variable 5 (prior misdemeanor convictions or juvenile adjudications), the court should count all prior misdemeanor convictions and prior misdemeanor juvenile adjudications for operating a vehicle, vessel, aircraft, or locomotive while under the influence of or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance. However, prior misdemeanor convictions that are used to enhance the current offense to felony status cannot be scored. For example, in a felony OUIL case (involving a third offense within ten years), the two prior convictions used to enhance the offense to felony status are not scored, but any other additional prior misdemeanor OUIL conviction will be. MCL 777.55(2)(b); MSA 28.--.

2. Amendments Pending as of September 1, 1999

Senate Bill 373 would revise the list of sentencing guidelines offenses to include many offenses that were created or changed by the 1998 amendments to the Vehicle Code. These offenses would be assigned class designations for purposes of scoring prior record variables. A list of some of the added Vehicle Code offenses and their class designations is as follows:

- OUIL, third offense within ten years, under §625(8)(c) — Class E.
- Allowing an intoxicated person to operate a vehicle, causing death or serious impairment of a body function under §625(9) — Class E (causing death) and G (causing serious impairment).
- OWI—third offense within ten years, under §625(10)(c) — Class E.
- Operating a commercial vehicle with an unlawful bodily alcohol content—third offense within ten years, under §625m(5) — Class E.
- Driving with a suspended or revoked license, causing death or serious impairment of a body function, under §904(4)–(5) — Class C (causing death) and G (causing serious impairment).

- Allowing a person to operate a vehicle with a suspended or revoked license, causing death or serious impairment of a body function under MCL 257.904(7); MSA 9.2604(7) — Class E (causing death) and G (causing serious impairment).

With respect to scoring an offense to which the guidelines apply, the pending amendments would eliminate the six crime group categories, and instruct courts to score all of the offense variables for each offender.

G. Sentence Credit

Offenders are not entitled to sentence credit under MCL 769.11b; MSA 28.1083(2) for:

- Time spent as a resident in a private rehabilitation program as a condition of probation. *People v Whiteside*, 437 Mich 188 (1991).
- Time spent on a tether program, if participation in the program is not due to the offender's being denied or unable to furnish bond. *People v Reynolds*, 195 Mich App 182 (1992).

In *Reynolds*, the Court of Appeals noted that the Double Jeopardy Clauses of the Michigan and federal constitutions only require sentence credit for confinements amounting to time spent "in jail." The Court of Appeals characterized the tether program at issue in the case as a "restriction, not a confinement." 195 Mich App at 184.

2.10 Licensing Sanctions

This section generally addresses driver's license suspensions and revocations that may be imposed by the Secretary of State in cases involving a violation of §625 or §904 of the Vehicle Code. It also contains information about restricted licenses, license reinstatement after revocation, and appeals to the circuit court from a licensing sanction imposed by the Secretary of State.

Note: Prior to October 1, 1999, both courts and the Secretary of State had statutory authority to order licensing sanctions for certain offenses, including OUIL, UBAC, and OUIL/OWI causing death or serious injury. For arrests after October 1, 1999, the authority to impose licensing sanctions has been consolidated in the Secretary of State in *all* cases, *except* for:

- Drug suspensions ordered under MCL 333.7408a; MSA 14.15(7408a); or,
- No proof of insurance convictions under MCL 257.328; MSA 9.2028.

A. Sanctions for Persons Who Commit an Offense While Driving with a Suspended or Revoked License

1. Driving with a Suspended or Revoked License and Causing Death or Serious Impairment of a Body Function

The Secretary of State must revoke a driver's license upon receiving records of conviction of driving while license suspended/revoked causing death or serious impairment of a body function under Vehicle Code §904(4) or (5). MCL 257.303(2)(d); MSA 9.2003(2)(d). Under MCL 257.303(4); MSA 9.2003(4), the offender's driving privileges shall not be renewed or restored until the later of the following:

“(a) The expiration of not less than 1 year after the license was revoked or denied.

“(b) the expiration of not less than 5 years after the date of a subsequent revocation or denial occurring within 7 years after the date of any prior revocation or denial.”*

*A similar provision appears at MCL 257.52(1); MSA 9.1852(1).

MCL 257.303(4); MSA 9.2003(4) additionally provides that the offender must “meet the requirements of the department” to obtain restoration.

Note: A conviction of driving while license suspended/revoked causing death or serious impairment of a body function under Vehicle Code §904(4) or (5) can also cause the Secretary of State to revoke a driver's license if this offense occurs in combination with certain drunk driving offenses. See MCL 257.303(2)(c)(i) and (f)(i); MSA 9.2003(2)(c)(i) and (f)(i), discussed below at Section 2.10(B).

2. Other Offenses Committed While Driving with a Suspended or Revoked License

Licensing sanctions for other offenses committed while driving with a suspended or revoked license are found in MCL 257.904(10)–(12); MSA 9.2604(10)–(12). Under these provisions, the Secretary of State must impose additional licensing sanctions upon persons convicted of or found responsible for the unlawful operation of a vehicle or a moving violation reportable under Vehicle Code §732 while driving with a suspended or revoked license.* The periods of sanction are as follows:

*Vehicle Code §732 contains abstract requirements. Violations reportable under §732 are listed in Section 2.12(C).

- If the violation occurred during a suspension of definite length, or if the violation occurred before the person was approved for a license following revocation, the Secretary of State must impose an additional like period of suspension or revocation. MCL 257.904(10); MSA 9.2604(10).
- If the violation occurred while the person's license was indefinitely suspended, or if the person's application for a license was denied, the

*MCL 257.319a–.319b; MSA 9.2019(1)–(2) contain general provisions governing suspensions or revocations of commercial vehicle licenses.

Secretary of State must impose a 30 day period of suspension or denial. MCL 257.904(11); MSA 9.2604(11).

- Upon receiving a record of the conviction, bond forfeiture, or a civil infraction determination of a person for unlawful operation of a commercial motor vehicle while the vehicle group designation is suspended under Vehicle Code §319a or §319b* or revoked, the Secretary of State shall immediately impose an additional like period of suspension or revocation. This provision applies only if the violation occurs: 1) during a suspension of definite length; 2) before the person is approved for a license following a revocation; or, 3) when the person is operating a commercial vehicle while disqualified under the Commercial Motor Vehicle Safety Act of 1986, 49 USC 31301 et seq. (containing federal criminal penalties for operating a commercial carrier under the influence of drugs or alcohol). MCL 257.904(12); MSA 9.2604(12).

The licensing sanctions in Vehicle Code §904(10)–(12) do not to apply to persons who operate a vehicle solely for the purpose of protecting human life or property if the life or property is endangered and summoning prompt aid is essential. MCL 257.904(15); MSA 9.2604(15).

B. Revocation of Driver’s License for Drunk Driving Offenses

The Secretary of State shall revoke a person’s driver’s license upon receipt of appropriate records of conviction of certain drunk driving offenses or combinations of drunk driving offenses listed in MCL 257.303(2)(c)–(f); MSA 9.2003(2)(c)–(f). These offenses are:

*Vehicle Code §625(6) is the “zero tolerance” provision.

“(2)(c) Any combination of 2 convictions within 7 years for any of the following or a combination of 1 conviction for a violation or attempted violation of section 625(6)* and 1 conviction for any of the following within 7 years:

(i) A violation or attempted violation of section 625(1), (3), (4), (5), or (7) [proscribing OUIL, OUID, UBAC, OWI, OUIL/OWI causing death or serious impairment of a body function, and child endangerment] or section 904(4) or (5) [proscribing DWLS causing death or serious impairment of a body function].

(ii) A violation of former section 625(1) or (2) or former section 625b. [Former §625(1) provided criminal penalties for OUIL and OUID. Former §625(2) prohibited driving with a blood alcohol content of 0.10 percent or more. Former §625b provided criminal penalties for OWI.]

(iii) A violation or attempted violation of section 625m [operating a commercial motor vehicle with an unlawful bodily alcohol content].

(iv) Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

“(d) One conviction for a violation or attempted violation of section 625(4) or (5) or section 904(4) or (5). [OUIL/OWI or DWLS causing death or serious impairment of a body function.]

“(e) One conviction of negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

“(f) Any combination of 3 convictions within 10 years for any of the following or 1 conviction for a violation or attempted violation of section 625(6) and any combination of 2 convictions for any of the following within 10 years, if any of the convictions resulted from an arrest on or after January 1, 1992:

(i) A violation or attempted violation of section 625(1), (3), (4), (5), or (7) [proscribing OUIL, OUID, UBAC, OWI, OUIL/OWI causing death or serious impairment of a body function, and child endangerment] or section 904(4) or (5) [proscribing DWLS causing death or serious impairment of a body function].

(ii) A violation of former section 625(1) or (2) or former section 625b. [Former §625(1) provided criminal penalties for OUIL and OUID. Former §625(2) prohibited driving with a blood alcohol content of 0.10 percent or more. Former §625b provided criminal penalties for OWI.]

(iii) A violation or attempted violation of section 625m [operating a commercial motor vehicle with an unlawful bodily alcohol content].

(iv) Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.”

Multiple convictions or civil infraction determinations resulting from the same incident shall be treated as a single violation for purposes of license denial or revocation. MCL 257.303(5); MSA 9.2003(5).

Under MCL 257.303(4); MSA 9.2003(4), the offender’s driving privileges shall not be renewed or restored until the later of the following:

“(a) The expiration of not less than 1 year after the license was revoked or denied.

“(b) the expiration of not less than 5 years after the date of a subsequent revocation or denial occurring within 7 years after the date of any prior revocation or denial.”*

*A similar provision appears at MCL 257.52(1); MSA 9.1852(1).

MCL 257.303(4); MSA 9.2003(4) additionally provides that the offender must “meet the requirements of the department” to obtain restoration.

*These provisions are cited at Section 2.10(B).

*See Section 1.4(D) for a definition of “ignition interlock device.”

C. Reinstatement of License After Revocation Expires — Issuance of Restricted License After Drunk Driving Conviction

If a person’s license has been denied or revoked upon conviction of a drunk driving offense as provided in MCL 257.303(2)(c), (d), or (f); MSA 9.2003(2)(c), (d), or (f),* that person may apply for a license or reinstatement of a license after expiration of the one or five year period set forth in MCL 257.303(4); MSA 9.2003(4). To obtain restricted driving privileges, the petitioner must rebut the presumption resulting from the prima facie evidence of his or her convictions by clear and convincing evidence, and “meet the requirements of the department.” MCL 257.303(4)(b)-(c); MSA 9.2003(4)(b)-(c). Secretary of State promulgated rules R 257.301-314 define the “requirements of the department” in more detail. If the hearing officer issues a restricted license following a hearing held after October 1, 1999, the officer shall impose both of the following requirements contained in MCL 257.322(6); MSA 9.2022(6):

“(a) Require installation of a functioning ignition interlock device...on each motor vehicle the person owns or intends to operate, the costs of which shall be borne by the person whose license is restricted.*

“(b) Condition issuance of a restricted license upon verification by the secretary of state that an ignition interlock device has been installed.”

Restricted licenses requiring an ignition interlock device shall be issued for a one year period. After that time, the hearing officer may continue the ignition interlock requirement for any length of time. MCL 257.322(9); MSA 9.2022(9).

Employer-owned vehicles that will be operated by an employee whose restricted license contains an ignition interlock requirement need not be equipped with such a device. However, the Secretary of State must notify the employer of the employee’s license restriction. This employer-owned vehicle exception does not apply to vehicles operated by a self-employed person who uses the vehicle for both business and personal use. MCL 257.322(8); MSA 9.2022(8).

The hearing officer must not issue a restricted license under the foregoing provisions that would permit the person to operate a commercial motor vehicle that hauls hazardous materials. MCL 257.322(7); MSA 9.2022(7).

For discussion of penalties imposed for ignition interlock device violations, see Section 5.1.

D. Suspension of Driver's License for §625 Offenses

1. Periods of Suspension

Suspension of a driver's license for a drunk driving violation under Vehicle Code §625 or §625m (operating a commercial vehicle with an unlawful bodily alcohol content) is governed by MCL 257.319(8); MSA 9.2019(8).^{*} The applicable periods of suspension are as follows:

- 180 days for a violation of §625(1) (OUIL/OUID/UBAC) if the defendant has no prior convictions within seven years. After expiration of the first 30 days of suspension, a restricted license may be issued for all or a portion of the suspension.
- 90 days for a violation of §625(3) (OWI) if the defendant was impaired due to the consumption of intoxicating liquor only and has no prior convictions within seven years.^{*} A restricted license may be issued for all or a portion of the suspension.
- 180 days for a violation of §625(3) (OWI) if the defendant was impaired due to the consumption a controlled substance or a combination of a controlled substance and intoxicating liquor and has no prior convictions within seven years. A restricted license may be issued for all or a portion of the suspension.
- 30 days for a violation of §625(6) (zero tolerance) if the defendant has no prior convictions within seven years. A restricted license may be issued for all or a portion of the suspension.
- 90 days for a violation of §625(6) (zero tolerance) if the defendant has one or more prior convictions of violating §625(6) within seven years. In this instance, the statute makes no provision for issuance of a restricted license during the period of the suspension.^{*}
- 180 days for violation of §625(7) (child endangerment) if the defendant had no prior convictions within seven years. After expiration of the first 90 days of suspension, a restricted license may be issued.
- 90 days for a violation of §625m (operating a commercial vehicle with an unlawful bodily alcohol content) if the defendant has no prior convictions within seven years. A restricted license may be issued for all or a portion of the suspension.

2. Restricted Licenses

A restricted license issued under MCL 257.319; MSA 9.2019 shall permit the defendant to drive under one or more of the circumstances listed in subsection (14) of the statute. These circumstances are:

“(a) In the course of the person's employment or occupation.

^{*}On suspensions imposed for refusal to submit to a chemical test under the Vehicle Code's “implied consent” provisions, see Section 2.3(C).

^{*}See Section 1.4(G) for a definition of “prior conviction.”

^{*}If the defendant has one or more prior convictions *other than* a violation of §625(6) within seven years, the defendant's license must be revoked. MCL 257.303(2)(c); MSA 9.2003(2)(c).

“(b) To and from any combination of the following:

- (i) The person’s residence.
- (ii) The person’s work location.
- (iii) An alcohol or drug education or treatment program as ordered by the court.
- (iv) The court probation department.
- (v) A court-ordered community service program.
- (vi) An educational institution at which the person is enrolled as a student.
- (vii) A place of regularly occurring medical treatment for a serious condition for the person or a member of the person’s household or immediate family.”

While driving, a person subject to a restricted license shall carry proof of his or her destination, and the hours of any employment, class, or other reason for traveling. The person must display this proof upon the request of a police officer. MCL 257.319(15); MSA 9.2019(15).

The Court of Appeals has narrowly construed the word “occupation” in a similar restricted license provision that preceded the current statute. In *People v Seeburger*, 225 Mich App 385 (1997), it held that “occupation” does not include child rearing as the second career of a working single parent, and refused to allow modification of a restricted license to permit a working mother to drive her children to and from school and day care.

E. Appeals From Licensing Sanctions

Persons aggrieved by a final determination by the Secretary of State denying, revoking, suspending, or restricting a driver’s license may file an appeal with the Secretary of State pursuant to MCL 257.322; MSA 9.2022. This statute empowers the Secretary of State to appoint hearing officers to hear such appeals, and sets forth procedural requirements for hearings.

The hearing officer’s decision may be appealed to the circuit court. MCL 257.323; MSA 9.2023 governs appeals to circuit court from a final determination by the Secretary of State denying, revoking, suspending, or restricting a driver’s license.

1. Appeal Procedures in Circuit Court

Under MCL 257.323(1); MSA 9.2023(1), appeals are taken to the circuit court in the county where the aggrieved person resides, except in the following cases:

- If the appeal arises from a refusal to submit to a chemical test under the implied consent statute, Vehicle Code §625f, it is taken in the county where the person was arrested.*
- If the appeal involves a failure to produce evidence of insurance under Vehicle Code §328, it is taken pursuant to the trial court's order.

The aggrieved person must file the petition for review within 63 days after the Secretary of State's determination is made; however, for good cause shown, this period may be extended to 182 days after the determination.

Once the petition for review is filed, the circuit court must enter an order setting the case for hearing on a day certain not more than 63 days after the date of the order. The order, the petition for review, and all supporting affidavits must be served on the Secretary of State's office in Lansing. The petition must include the driver's full name, address, birth date, and driver's license number. Service must be made not less than 20 days before the hearing date, unless the aggrieved person is seeking a review of the record made at the administrative hearing. In the latter case, service must be made not less than 50 days before the hearing date. MCL 257.323(2); MSA 9.2023(2).

2. Standard of Review

For certain license denials, suspensions, or restrictions, the court may take testimony and examine all the facts and circumstances relating to the sanction. The sanctions for which this level of review is permitted are as follows:

- DWLS suspensions imposed under Vehicle Code §904(10) or (11).
- A first violation under the implied consent statute, Vehicle Code §625f.
- A refusal to issue a license to a person afflicted with a physical or mental disability or disease preventing that person from exercising reasonable and ordinary control over a vehicle under Vehicle Code §303(1)(g).
- A suspension or restriction, of a license based on a physical or mental disability or infirmity, or upon an unsafe driving record under Vehicle Code §320.
- A licensing action under Vehicle Code §310d, governing probationary licenses.

In the foregoing cases, the court may affirm, modify, or set aside the restriction, suspension, or denial; however, it may not order the Secretary of State to issue a restricted or unrestricted license that would permit a person to drive a commercial motor vehicle hauling a hazardous material. The petitioner shall file a certified copy of the court's order with the Secretary of State's office in Lansing within seven days after entry of the order. MCL 257.323(3); MSA 9.2023(3).

*For appeals in cases where license sanctions were imposed for refusal to submit to a chemical test under the implied consent statute, see Section 2.3(C)(4).

For denials, suspensions, restrictions, or revocations imposed for Vehicle Code violations other than those listed above, the scope of judicial review is more limited. Under MCL 257.323(4); MSA 9.2023(4), the court shall confine its consideration to a review of the administrative hearing or driving records for a statutory legal issue, and shall not grant restricted driving privileges. The court shall set aside the hearing officer's determination only if the petitioner's substantial rights have been prejudiced because the determination is any of the following:

- In violation of the U.S. Constitution, the Michigan Constitution, or a statute.
- In excess of the Secretary of State's statutory authority or jurisdiction.
- Made upon unlawful procedure resulting in material prejudice to the petitioner.
- Not supported by competent, material, and substantial evidence on the whole record.
- Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.
- Affected by other substantial and material error of law.

Note: For license denials or revocations imposed under MCL 257.303; MSA 9.2003, the following provision regarding judicial review applies:

“Judicial review of an administrative licensing sanction under section 303 shall be governed by the law in effect at the time the offense was committed or attempted. If 1 or more of the convictions involved in an administrative licensing sanction is a violation or attempted violation of this act committed or attempted after January 1, 1992, judicial review of that sanction shall be governed by the law in effect after January 1, 1992.” MCL 257.320e(6); MSA 9.2020(5)(6).

F. Stay of Licensing Sanction Pending Appeal from Misdemeanor Drunk Driving Conviction

In misdemeanor drunk driving cases, MCL 257.625b(6); MSA 9.2325(2)(6) provides for a stay of licensing sanctions pending appeal as follows:

“If the judgment and sentence are appealed to the circuit court, the court may ex parte order the secretary of state to stay the suspension, revocation, or restricted license issued by the secretary of state pending the outcome of the appeal.”

This provision does not specify the drunk driving offenses to which it applies. As it refers to appeals to circuit court, it apparently applies to the misdemeanor violations mentioned in Vehicle Code §625b, which are:

- OUIL/OUID/UBAC in violation of §625(1) or a substantially corresponding local ordinance.
- OWI in violation of §625(3) or a substantially corresponding local ordinance.
- Zero tolerance violations under §625(6) or a substantially corresponding local ordinance.
- Child endangerment under §625(7).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m or a substantially corresponding local ordinance.

2.11 Vehicle Sanctions

The 1998 amendments to the Vehicle Code authorize (or, in some cases, require) courts to impose vehicle sanctions as part of the sentence for certain drunk driving or DWLS offenses. These sanctions consist of vehicle immobilization under MCL 257.904d; MSA 9.2604(4), and vehicle forfeiture under MCL 257.625n; MSA 9.2325(14). Additionally, the Secretary of State may deny registration to certain offenders under MCL 257.219(1)(d), (2)(d); MSA 9.1919(1)(d), (2)(d). This section generally addresses procedures that apply when imposing the foregoing vehicle sanctions. Information about the mandatory imposition or duration of these sanctions in the context of specific offenses is found in the discussion of these offenses that follows in Chapters 3 and 4. Penalties for violations of vehicle sanctions are found in Chapter 5.

Note: In addition to the vehicle sanctions discussed in this section, the Vehicle Code also authorizes registration plate confiscation and driver's license restrictions requiring installation of an ignition interlock device. Registration plate confiscation is discussed at Section 2.5. Restricted licenses requiring installation of an ignition interlock device are addressed at Section 2.10(C).

A. Immobilization

Vehicle immobilization is intended to limit the repeat offender's access to motor vehicles. MCL 257.904d(8)(b); MSA 9.2604(4)(8)(b) defines "immobilization" of a vehicle to mean "requiring the motor vehicle involved in the violation immobilized in a manner provided in section 904e."

MCL 257.904e(1); MSA 9.2604(5)(1) authorizes courts to order vehicle immobilization "by the use of any available technology approved by the court that locks the ignition, wheels, or steering of the vehicle or otherwise prevents

any person from operating the vehicle or that prevents the defendant from operating the vehicle.” The statute further gives the court discretion to order storage of an immobilized vehicle in a place and manner it deems appropriate. The defendant may be ordered to pay the costs of immobilization and storage.

Note: Immobilization technology is being privatized and must be paid for by the defendant. Immobilization techniques include:

- Ignition lock.
- Steering column lock or club.
- Wheel boot.
- Impoundment.
- Tethering the defendant.

Under MCL 257.904d(4); MSA 9.2604(4)(4), immobilization can be ordered if authorized or required by statute, and:

- The defendant owns, co-owns, leases, or co-leases the vehicle; or,
- The vehicle’s owner, co-owner, lessee, or co-lessee knowingly permitted the defendant to drive the vehicle in violation of Vehicle Code §625(2) or §904(1), regardless of whether a conviction resulted. The owner may request a court hearing on the issue of whether he or she “knowingly” allowed the defendant to operate the vehicle.

1. Offenses Subject to Immobilization

Depending upon the offense (or number of offenses), vehicle immobilization may be a mandatory sanction, or one imposed at the court’s discretion.

Mandatory Immobilization - MCL 257.904d(1)–(2); MSA 9.2604(4)(1)–(2) require vehicle immobilization upon conviction of the following violations of Vehicle Code §625 and §904:

- Any violation of §625(4) or (5) (OUIL/OUID/UBAC/OWI causing death or serious impairment of a body function).
 - First-time offenders are subject to immobilization for a maximum 180 days.
 - Offenders with one conviction within seven years after a prior conviction are subject to immobilization for not less than 90 days or more than 180 days.*
 - Offenders with two or more prior convictions within ten years are subject to immobilization for not less than one year or more than three years.
- Any violation of §904(4) or (5) (DWLS causing death or serious impairment of a body function). First time offenders and offenders

*See Section 1.4(G) for a definition of “prior conviction” under MCL 257.904d; MSA 9.2604(4).

with one prior §904 suspension within seven years are subject to immobilization for not more than 180 days.

- A moving violation committed while driving with a suspended/revoked license and occurring within seven years of two or more prior suspensions, revocations, or denials imposed under §904(10), (11), or (12) (which impose additional licensing sanctions on persons who commit moving violations while driving with a suspended/revoked license)
 - Offenders with any combination of two or three prior suspensions, revocations, or denials under §904(10), (11), or (12) within the past seven years are subject to immobilization for not less than 90 days or more than 180 days.
 - Offenders with any combination of four or more prior suspensions, revocations, or denials under §904(10), (11), or (12) within the past seven years are subject to immobilization for not less than one year or more than three years.
- A violation of §625(1), (3), or (7) (OUIL, OUID, UBAC, OWI, or child endangerment) within seven years after one prior conviction or within ten years after two or more prior convictions:*
 - Offenders with one conviction within seven years after a prior conviction are subject to immobilization for not less than 90 days or more than 180 days.
 - Offenders with two or more prior convictions within 10 years are subject to immobilization for not less than one year or more than three years.

*See Section 1.4(G) for a definition of “prior conviction.”

Immobilization in the Court’s Discretion - The court has discretion to order immobilization for the following offenses:

- For first offenders under §625(1), (3), or (7) (OUIL, OUID, UBAC, OWI, or child endangerment), the court has discretion to order vehicle immobilization for not more than 180 days. MCL 257.904d(1)(a); MSA 9.2604(4)(1)(a).
- For a moving violation committed while driving with a suspended/revoked license and occurring within seven years of one prior suspension, revocation, or denial under §904(10), (11), or (12), the court may order immobilization for not more than 180 days. MCL 257.904d(2)(a); MSA 9.2604(4)(2)(a).

The immobilization provisions in MCL 257.904d; MSA 9.2604(4) do not apply in cases involving the following circumstances listed in subsection (7) of the statute:

- Suspensions, revocations, or denials based on a violation of the Support and Parenting Time Enforcement Act, MCL 552.601 et seq.; MSA 25.164(1) et seq.

- Rental vehicles.
- Vehicles registered in other states.
- Violations of Chapter II of the Vehicle Code, regarding administration, registration, certificate of title, and anti-theft, or a substantially corresponding local ordinance.
- Violations of Chapter V of the Vehicle Code, the Financial Responsibility Act, or a substantially corresponding local ordinance.
- Violations for failure to change address, under the Vehicle Code or a substantially corresponding local ordinance.
- Parking violations, under the Vehicle Code or a substantially corresponding local ordinance.
- Bad check violations, under state law, or a substantially corresponding local ordinance.
- Equipment violations, under the Vehicle Code or a substantially corresponding local ordinance.
- A pedestrian, passenger, or bicycle violation, other than a violation of:
 - MCL 436.1703(1) or (2); MSA-- (purchases of alcohol by minors); or,
 - MCL 257.624a or 624b; MSA 9.2324(1) or (2) (open container, minor in possession of alcohol); or,
 - A local ordinance substantially corresponding to the foregoing statutes.

2. Procedures for Immobilization

If the drunk driving or DWLS charges against a repeat offender may result in immobilization, the prosecuting attorney must include a statement listing the defendant's prior convictions on the complaint and information. MCL 257.625(14); MSA 9.2325(14) and MCL 257.904(8); MSA 9.2604(8).

If immobilization is mandatory for an offense, the court's order for immobilization may not be suspended. MCL 257.904d(5); MSA 9.2604(4)(5). Periods of immobilization must begin at the end of any term of imprisonment imposed on the defendant for the violation that results in the immobilization. MCL 257.904d(6); MSA 9.2604(4)(6).

In a case where immobilization is ordered, the defendant shall provide the court with the identification and registration plate numbers of the vehicle involved in the violation. MCL 257.904d(3); MSA 9.2604(4)(3). The court must require the defendant or a person who provides immobilization services to provide proof of immobilization. MCL 257.904e(8); MSA 9.2604(5)(8). The sentencing abstract must indicate the vehicle identification and registration plate numbers, as well as the length and starting date of immobilization. MCL 257.732(3)(h)–(i); MSA 9.2432(3)(h)–(i).

3. Effect of an Order for Immobilization

The following restrictions apply during a period of immobilization:

- A defendant prohibited from operating a vehicle by immobilization may not purchase, lease, or otherwise obtain another vehicle during the immobilization period. MCL 257.904e(3); MSA 9.2604(5)(3).
- The immobilized vehicle may be sold, but not to anyone who is exempt from paying a use tax under MCL 205.93; MSA 7.555(3)(3). MCL 257.904e(2); MSA 9.2604(5)(2). Transfers exempt from use tax under MCL 205.93(3); MSA 7.555(3)(3) occur when:
 - The transferee or purchaser has one of the following relationships to the transferor: spouse, mother, father, brother, sister, child, stepparent, stepchild, stepbrother, stepsister, grandparent, grandchild, legal ward, or a legally appointed guardian with a certified letter of guardianship.
 - The transfer is a gift to a beneficiary in the administration of an estate.
 - The vehicle has once been subjected to Michigan sales or use tax and is transferred in connection with the organization, reorganization, dissolution, or partial liquidation of an incorporated or unincorporated business and the beneficial ownership is not changed.
 - An insurance company licensed to conduct business in this state acquires ownership of a late model distressed vehicle as defined in MCL 257.12a; MSA 9.1812(1), through payment of damages in response to a claim or when the person who owned the vehicle before the insurance company reacquires ownership from the company as part of the settlement of a claim.

If a law enforcement officer stops a vehicle that is being driven in violation of an immobilization order, the vehicle will be impounded, following an appropriate court order. MCL 257.904e(7); MSA 9.2604(5)(7).

Removing, tampering with, or bypassing an immobilization device (or attempting to do so) is a misdemeanor. Misdemeanor sanctions are also imposed on persons who sell, acquire, or operate a vehicle in violation of an order for immobilization. See Section 5.2 on immobilization violations.

*For information on forfeiture as a sanction for a specific offense, see the discussion of the offense in Chapters 3 and 4. See Section 1.4(G) for a definition of “prior conviction.”

B. Forfeiture

Vehicle forfeiture may be imposed at the court’s discretion for various drunk driving or DWLS offenses under §625 and §904 of the Vehicle Code. These offenses are listed in MCL 257.625n; MSA 9.2325(14), as follows:*

- OUIL/OUID/UBAC under §625(1), occurring within seven years of one prior conviction or within ten years of a second or subsequent prior conviction.
- OWI under §625(3), occurring within seven years of one prior conviction or within ten years of a second or subsequent prior conviction.
- OUIL/OUID/UBAC/OWI causing death or serious impairment of a body function under §625(4)–(5).
- Child endangerment under §625(7).
- DWLS causing death or serious impairment of a body function under §904(4)–(5).

The vehicle forfeiture provisions in MCL 257.625n; MSA 9.2325(14) apply to vehicles that are: 1) owned by the defendant in whole or in part; or, 2) leased by the defendant. If a vehicle subject to forfeiture is leased by the defendant, the court will order the vehicle returned to the lessor. MCL 257.625n(1)(b); MSA 9.2325(14)(1)(b).

Vehicles may be seized by court order issued upon a showing of probable cause that the vehicle is subject to forfeiture. However, any forfeiture is subject to the interest of the holder of a security interest who did not have prior knowledge of or consent to the violation. MCL 257.625n(2)–(3); MSA 9.2325(14)(2)–(3).

1. Commencement of Forfeiture Proceedings

If the prosecutor seeks forfeiture, the complaint and information filed in connection with the criminal offense must also include a statement listing the defendant’s prior convictions. MCL 257.625(14); MSA 9.2325(14). Vehicle Code §625n allows the prosecutor to commence vehicle forfeiture proceedings either before or after the disposition of the underlying criminal charges.*

If the vehicle is seized before disposition of the criminal proceedings, the defendant may move to require the seizing agency to file a lien against the vehicle and to return the vehicle to its owner or lessee pending the outcome of the case. The court must hear the defendant’s motion within seven days after it is filed. The court may order the return of the vehicle to the owner or lessee if the defendant establishes that:

- The defendant holds the legal title to the vehicle or has a leasehold interest in it; and,

*The §625n forfeiture provisions do not preclude the prosecutor from pursuing forfeiture under any other Michigan statute or a local ordinance substantially corresponding to §625n. MCL 257.625n(12); MSA 9.2325(14)(12).

- It is necessary for the defendant or a member of defendant's family to use the vehicle pending the outcome of the forfeiture action.

If the court orders the vehicle returned to the owner or lessee, it shall order the defendant to post bond in an amount equal to the retail value of the vehicle, and shall also order the seizing agency to file a lien against the vehicle. MCL 257.625n(5); MSA 9.2325(14)(5).

The prosecutor commences forfeiture proceedings after the defendant's conviction of one of the violations listed in Vehicle Code §625n by filing a petition within 14 days after the conviction. In this case, the prosecutor must give notice that the vehicle may be forfeited by first class mail or other process to the defendant, the defendant's attorney, all owners of the vehicle, and all persons holding a security interest in the vehicle. MCL 257.625n(4); MSA 9.2325(14)(4).

Note: The failure of the court or prosecutor to comply with any time limit specified in §625n does not preclude the court from ordering forfeiture of a vehicle, unless the court finds that the owner or claimant suffered substantial prejudice as a result of that failure. MCL 257.625n(11); MSA 9.2325(14)(11).

2. Forfeiture Hearing

Within 14 days after the prosecutor gives notice that a vehicle may be forfeited, the defendant, an owner, a lessee, or a holder of a security interest may file a claim of interest in the vehicle with the court. Within 21 days after the expiration of the period for filing claims, but before or at sentencing, the court shall hold a hearing to determine:

- The legitimacy of any claim.
- The extent of any co-owner's equity interest.
- The liability of the defendant to any co-lessee. The court may order the defendant to pay a co-lessee any liability as determined at the hearing. The court's order may be enforced in the same way as a civil judgment. MCL 257.625n(8); MSA 9.2325(14)(8).
- Whether to order the vehicle forfeited or returned to the lessor. The return of a vehicle to the lessor under this section does not affect or impair the lessor's rights or the defendant's obligations under the lease. MCL 257.625n(9); MSA 9.2325(14)(9).

In considering whether to order forfeiture, the court shall review the defendant's driving record to determine whether the defendant has multiple convictions under §625 of the Vehicle Code or a substantially corresponding local ordinance, and/or multiple suspensions, restrictions, or denials under §904 of the Vehicle Code. Multiple sanctions under these provisions shall weigh heavily in favor of forfeiture. MCL 257.625n(6); MSA 9.2325(14)(6).

3. Disposition of Proceeds of Sale of Forfeited Vehicle

If a vehicle is forfeited under §625n, subsection (7) of the statute requires the unit of government that seized the vehicle to sell it and dispose of the proceeds in the following order of priority:

- Pay any outstanding security interest of a secured party who did not have prior knowledge of or consent to the violation.
- Pay the equity interest of a co-owner who did not have prior knowledge of or consent to the violation.
- Satisfy any order of restitution entered in the prosecution for the violation.
- Pay the claim of each person who shows that he or she is a victim of the violation to the extent that the claim is not covered by an order of restitution.
- Pay any outstanding lien against the property that has been imposed by a governmental unit.
- Pay the proper expenses of the proceedings for forfeiture and sale, including but not limited to, expenses incurred during the seizure process and expenses for maintaining custody of the property, advertising, and court costs.

The balance remaining after payment of the foregoing items shall be distributed by the court to the unit or units of government substantially involved in effecting the forfeiture. MCL 257.625n(7)(g); MSA 9.2325(14)(7)(g).

Note: Transfers of a vehicle to avoid forfeiture are a misdemeanor. See Section 5.3.

C. Registration Denial

Effective June 1, 2000, the Secretary of State shall refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner, co-owner, lessee or co-lessee is suspended, revoked, or denied for one of the following offenses:

- A third or subsequent violation of Vehicle Code §625 or §625m or a local ordinance substantially corresponding to these sections.
- A fourth or subsequent suspension or revocation of a driver's license under Vehicle Code §904.

MCL 257.219(1)(d), (2)(d); MSA 9.1919(1)(d), (2)(d).

2.12 Abstract of Conviction Requirements

A. General Requirements for Forwarding Abstracts to the Secretary of State

MCL 257.732(1); MSA 9.2432(1) requires court clerks and municipal judges to keep a full record of every case in which a person is charged with or cited for a violation of the Vehicle Code or a substantially corresponding local ordinance. Abstracts of the court records must be prepared and forwarded to the Secretary of State for cases specified in the statute.

MCL 257.732(2); MSA 9.2432(2) further requires a city or village to send a report to the Secretary of State if a department, bureau, or person within it is authorized to accept a payment of money as a settlement for a violation of a local ordinance substantially corresponding to a Vehicle Code provision.

Every person required to forward abstracts to the Secretary of State must certify for the period from January 1 through June 30 and for the period July 1 through December 31 that all abstracts required to be forwarded during the period have been forwarded. The certification must be made on a form provided by the Secretary of State and filed not later than 28 days after the end of the period covered by the certification. Failure to comply with this certification requirement is grounds for removal from office. MCL 257.732(12)–(13); MSA 9.2432(12)–(13).

Abstracts sent to the Secretary of State are open for public inspection and are entered upon a person's master driving record. MCL 257.732(14); MSA 9.2432(14). Courts are prohibited from ordering expunction of any violation reportable to the Secretary of State. MCL 257.732(20); MSA 9.2432(20).

B. Form of Abstract

Forms for abstracts are furnished by the Secretary of State. MCL 257.732(3)(a)–(i); MSA 9.2432(3)(a)–(i) requires that the abstract be certified as correct by the signature, stamp, or facsimile signature of the person required to prepare the abstract, and that it include all of the following:

- “(a) The name, address, and date of birth of the person charged or cited.
- “(b) The number of the person's operator's or chauffeur's license, if any.
- “(c) The date and nature of the violation.
- “(d) The type of vehicle driven at the time of the violation and, if the vehicle is a commercial motor vehicle, that vehicle's group designation and indorsement classification.
- “(e) The date of the conviction, finding, forfeiture, judgment, or civil infraction determination.

“(f) Whether bail was forfeited.

“(g) Any license restriction, suspension, or denial ordered by the court as provided by law.

“(h) The vehicle identification number and registration plate number of all vehicles that are ordered immobilized or forfeited.

“(i) Other information considered necessary to the secretary of state.”

C. Time for Sending Abstracts — Offenses Included in Abstract Requirements

The time requirements for sending the abstract vary according to the type of offense involved.

1. Drunk Driving Violations Where the Charge Is Dismissed or the Defendant Acquitted

MCL 257.732(1)(b); MSA 9.2432(1)(b) provides that an abstract must be *immediately* prepared and forwarded to the Secretary of State for each case charging a listed drunk driving violation in which the charge is dismissed or the defendant acquitted. The violations to which this requirement applies are as follows:

- OUIL/OUID/UBAC under §625(1).
- OWI under §625(3).
- OUIL/OUID/UBAC/OWI causing death or serious impairment of a body function under §625(4)–(5).
- Zero tolerance violations under §625(6).
- Child endangerment under §625(7).
- Operating a commercial vehicle with an unlawful bodily alcohol content under §625m.
- Local ordinance violations substantially corresponding to §625(1), (3), or (6), or §625m.

2. Other Vehicle Code Violations

In other cases where there has been a charge of or citation for violating or attempting to violate the Vehicle Code or a substantially corresponding local ordinance, an abstract must be prepared and forwarded to the Secretary of State within 14 days after:*

- A conviction;
- A forfeiture of bail;
- An entry of a civil infraction determination; or,
- An entry of a default judgment.

*The court also must submit sentencing data following the abstract for §625 offenses; this information is required for the drunk driving audit under Vehicle Code §625i .

MCL 257.732(1)(a); MSA 9.2432(1)(a). Exceptions to this requirement are listed in MCL 257.732(15); MSA 9.2432(15); abstracts need not be submitted for the following convictions or civil infraction determinations:

- Parking or standing violations.
- Non-moving violations that are not the basis for a license suspension, revocation, or denial. The Secretary of State must inform the court of the offenses in this category. MCL 257.732(17); MSA 9.2432(17).
- Violations under Chapter II of the Vehicle Code (regarding administration, registration, certificate of title, and anti-theft) that are not the basis for a license suspension, revocation, or denial. The Secretary of State must inform the court of the offenses in this category. MCL 257.732(17); MSA 9.2432(17).
- Pedestrian, passenger, or bicycle violations, other than certain violations under MCL 436.1703; MSA-- (minor purchasing, consuming, or possessing alcohol), MCL 257.624a–.624b; MSA 9.2324(1)–(2) (open container and minor-in-possession), or substantially corresponding local ordinances.
- Safety belt violations under MCL 257.710e; MSA 9.410(5).

3. Penal Offenses Not Found in the Vehicle Code — Felonies in Which a Motor Vehicle Was Used

Under MCL 257.732(4); MSA 9.2432(4), the court must also forward abstracts to the Secretary of State upon a person's conviction of the following penal offenses not contained in the Vehicle Code:

- Unlawful driving away a motor vehicle, MCL 750.413; MSA 28.645, or an attempt to commit this offense.
- Unlawful use of an automobile, without intent to steal, MCL 750.414; MSA 28.646, or an attempt to commit this offense.
- Failure to obey a police or conservation officer's direction to stop, MCL 750.479a; MSA 28.747(1), or an attempt to commit this offense.
- Felonious driving, MCL 752.191; MSA 28.661, or an attempt to commit this offense.
- Negligent homicide with a motor vehicle, MCL 750.324; MSA 28.556, or an attempt to commit this offense.
- Manslaughter with a motor vehicle, MCL 750.321; MSA 28.553, or an attempt to commit this offense.
- Murder with a motor vehicle, MCL 750.316; MSA 28.548 (first-degree murder), and MCL 750.317; MSA 28.549 (second-degree murder), or an attempt to commit this offense.
- Minor purchasing or attempting to purchase, consuming or attempting to consume, or possessing or attempting to possess alcoholic liquor,

MCL 436.1703; MSA--, or a local ordinance substantially corresponding to this section.

- An attempt to violate, a conspiracy to violate, or a violation of a controlled substance provision listed in MCL 333.7401–333.7461; MSA 14.15(7401)–14.15(7461), MCL 333.17766a; MSA 14.15(17766a), or a local ordinance prohibiting the same conduct, unless the person convicted is sentenced to life imprisonment or a minimum term of imprisonment exceeding one year.

Additionally, if the court determines as part of the sentence that a felony for which a person was convicted was one in which a motor vehicle or a commercial motor vehicle was used, MCL 257.732(8) and (11); MSA 9.2432(8) and (11), require the court to forward an abstract of the record of conviction to the Secretary of State.

Note: The prosecutor must have met certain notice requirements before the court is required to send an abstract of conviction in felony cases where a motor vehicle or commercial motor vehicle was used. These are set forth in MCL 257.732(6) and (10); MSA 9.2432(6) and (10). See Section 6.4(D) for more information.

2.13 Failures to Appear in Court or to Comply with a Judgment

This section addresses the misdemeanor and licensing sanctions that apply when a person fails to answer a citation or appear in court, or fails to comply with a court order or judgment.

A. Misdemeanor Sanctions

MCL 257.321a(1); MSA 9.2021(1)(1) imposes misdemeanor sanctions of up to 93 days imprisonment and/or a \$100.00 fine for the following:

- Failure to answer a citation or a notice to appear in court for a violation reportable to the Secretary of State under MCL 257.732; MSA 9.2432 or a local ordinance substantially corresponding to a violation that is reportable under Vehicle Code §732.*
- Failure to comply with an order or judgment of the court, including, but not limited to, paying all fines, costs, fees, and assessments.

B. License Suspension

In addition to misdemeanor sanctions, license suspension can result from a person's failure to answer a citation or notice to appear in court or failure to comply with a judgment as described in MCL 257.321a(1); MSA 9.2021(1)(1). Under MCL 257.321a(2)–(4); MSA 9.2021(1)(2)–(4), the court is required to notify the person that license suspension may result from his or her inaction. If the person does not appear or comply with the court's order or judgment within

*See Section 2.12(C) for a list of violations reportable under §732.

a stated time after receiving notice from the court, the court must report this failure to the Secretary of State. Upon receipt of the report from the court, the Secretary of State is to immediately suspend the person's license. The time requirements contained in the court's notices differ depending upon the charges brought against the person.

1. Drunk Driving and Alcohol-Related Offenses

If a person charged with certain drunk driving or alcohol-related offenses fails to appear or comply with a judgment, the notice from the court must be sent immediately by first-class mail to the person's last known address. The notice shall state that the person's license will be suspended if he or she fails to appear within seven days of issuance of the notice, or fails to comply with the court's order or judgment within 14 days of issuance of the notice. If the person fails to comply with this notice, the court must immediately notify the Secretary of State, who will immediately suspend the person's license and notify the person by first-class mail sent to the person's last known address. MCL 257.321a(3)-(4); MSA 9.2021(1)(3)-(4). The offenses to which these seven and 14 day time requirements apply are listed below.

MCL 257.321a(3); MSA 9.2021(1)(3) lists the following offenses:

- OUIL/OUID/UBAC under Vehicle Code §625(1), or a local ordinance substantially corresponding to this section.
- Knowingly permitting a person who is under the influence of alcoholic liquor and/or a controlled substance to drive, under Vehicle Code §625(2), or a local ordinance substantially corresponding to this section.
- OWI, under Vehicle Code §625(3), or a local ordinance substantially corresponding to this section.
- OUIL/OUID/UBAC/OWI causing death or serious impairment of a body function, under Vehicle Code §625(4)-(5).
- Zero tolerance violations under Vehicle Code §625(6), or a local ordinance substantially corresponding to this section.
- Child endangerment under Vehicle Code §625(7).

These offenses are listed in MCL 257.321a(4); MSA 9.2021(1)(4):

- Transporting or possessing alcoholic liquor in open container, under Vehicle Code §624a.
- Transporting or possessing alcoholic liquor in a motor vehicle by a person under 21 years old, unless required by the person's employment, under Vehicle Code §624b.
- Purchase, consumption, or possession of alcoholic liquor by a person under age 21, under MCL 436.1703; MSA --.

*See Section 2.12(C) for a list of violations reportable under §732.

2. Offenses Other than Drunk Driving or Alcohol-Related Offenses

In other cases of noncompliance with a judgment or failure to appear for a violation reportable under Vehicle Code §732,* the notice from the court must be mailed to the person's last known address at least 28 days after the person fails to appear or comply with an order or judgment. The notice shall state that the person's license will be suspended if he or she fails to appear or to comply with the court's order or judgment within 14 days of issuance of the notice. If the person fails to comply with this notice, the court must notify the Secretary of State within 14 days. The Secretary of State will then immediately suspend the person's license and notify the person by regular mail sent to the person's last known address. MCL 257.321a(2); MSA 9.2021(1)(2).

3. Duration of Sanction

Suspensions imposed for offenses covered by MCL 257.321a(2); MSA 9.2021(1)(2) and MCL 257.321a(3); MSA 9.2021(1)(3) (concerning drunk driving offenses under Vehicle Code §625) will remain in effect until both of the following occur:

- Each court in which the person failed to answer a citation or notice to appear or failed to pay a fine or cost has notified the Secretary of State that the person has answered the citation or notice or appear or paid the fine or cost.
- The person has paid the court a \$25.00 driver license clearance fee for each failure to answer a citation or failure to pay a fine or cost. The court shall transfer 60% of these fees to the Secretary of State on a monthly basis.

MCL 257.321a(5), (11); MSA 9.2021(1)(5), (11).

4. Use of FAC/FCJ Suspension for Enhancement Purposes

Although drivers with license suspensions imposed under Vehicle Code §321a are subject to mandatory additional suspensions under §904(10)–(11) for committing a moving violation during the FAC/FCJ suspension, a one-time exemption from these additional sanctions applies. A moving violation during a first FAC/FCJ suspension will not be subjected to the mandatory additional sanctions in §904(10)–(12); however, this exemption applies only once during a person's lifetime. If the person receives a second violation of an FAC/FCJ suspension, both it and the first suspension violation will be considered for purposes of enhancement. MCL 257.904(18); MSA 9.2604(18).